

DOCKET



SUPREME COURT

OF THE UNITED STATES

No. 12-17

Title: Mark J. McBurney, et al., Petitioners

v.

Nathaniel L. Young, Deputy Commissioner and Director, Virginia Division of Child Support Enforcement, et al.

Docketed: July 5, 2012

Linked with 11A1012

Lower Ct: United States Court of Appeals for the Fourth Circuit

Case Nos.: (11-1099)

Decision Date: February 1, 2012

Questions Presented

~~~Date~~~ ~~~~~Proceedings and Orders~~~~~

Apr 20 2012 Application (11A1012) to extend the time to file a petition for a writ of certiorari from May 1, 2012 to June 30, 2012, submitted to The Chief Justice.

Apr 25 2012 Application (11A1012) granted by The Chief Justice extending the time to file until June 29, 2012.

Jun 29 2012 Petition for a writ of certiorari filed. (Response due August 6, 2012)

Jul 9 2012 Waiver of right of respondents Nathaniel L. Young, Deputy Commissioner and Director, Virginia Division of Child Support Enforcement, et al. to respond filed.

Jul 18 2012 Waiver of right of respondent Thomas C. Little to respond filed.

Jul 25 2012 DISTRIBUTED for Conference of September 24, 2012.

Jul 30 2012 Response Requested . (Due August 29, 2012)

Aug 28 2012 Brief amici curiae of American Society of News Editors, et al. filed.

Aug 29 2012 Brief amici curiae of Citizens for Responsibility and Ethics in Washington (CREW), et al. filed.

Aug 29 2012 Brief of respondents Nathaniel L. Young, Deputy Commissioner and Director, Virginia Division of Child Support Enforcement, et al. in opposition filed.

Aug 29 2012 Brief amici curiae of Judicial Watch, Inc., et al. filed.

Aug 29 2012 Brief amici curiae of Coalition for Sensible Public Records Access, et al. filed.

Sep 12 2012 DISTRIBUTED for Conference of October 5, 2012.

Sep 12 2012 Reply of petitioners Mark J. McBurney, et al. filed. (Distributed)

Oct 5 2012 Petition GRANTED.

Nov 9 2012 The time to file the joint appendix and petitioners' brief on the merits is extended to and including December 14, 2012.

Dec 4 2012 Motion to dispense with printing the joint appendix filed by petitioner Mark J. McBurney, et al.

Dec 7 2012 The time to file the joint appendix and petitioners' brief on the merits is further extended to and including December 21, 2012.

Dec 10 2012 Motion to dispense with printing the joint appendix filed by petitioners GRANTED.

Dec 16 2012 Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioners

Dec 18 2012 SET FOR ARGUMENT ON Wednesday, February 20, 2013

Dec 18 2012 The time to file the joint appendix and petitioners' brief on the merits is further extended to and including December 26, 2012.

Dec 26 2012 Brief of petitioners Mark J. McBurney, et al. filed.

Jan 2 2013 Brief amici curiae of The Reporters Committee for Freedom of the Press and 53 Media Organizations, et al. filed.

Jan 2 2013 Brief amici curiae of Judicial Watch, Inc., and Allied Educational Foundation filed.

Jan 2 2013 Brief amici curiae of Coalition for Sensible Public Records Access, et al. filed.

Jan 2 2013 Brief amicus curiae of Institute for Justice filed.

Jan 2 2013 Brief amicus curiae of Public Justice, P.C. filed.

Jan 2 2013 Brief amici curiae of American Civil Liberties Union, et al. filed. (Distributed)

Jan 4 2013 Record received from the U.S.C.A. for the 4th Circuit. 1 Box

Jan 4 2013 Record from U.S.D.C. for Eastern District of Virginia is electronic.

Jan 10 2013 CIRCULATED.

Jan 24 2013 Brief of respondents Nathaniel L. Young, Deputy Commissioner and Director, Virginia Division of Child Support Enforcement, et al. filed. (Distributed)

Jan 30 2013 Brief amici curiae of National Conference of State Legislatures, et al. filed. (Distributed)

Jan 30 2013 Proposal from counsel for amici curiae National Conference of State Legislatures, et al. to lodge copies of three letters from local governmental entities referenced in their brief.

Jan 31 2013 Brief amici curiae of Local Government Attorneys of Virginia, Inc., et al. filed. (Distributed)

Feb 4 2013 Letter from counsel for petitioners opposing lodging proposed by National Conference of State Legislatures, et al.

Feb 8 2013 Reply from counsel for amici National Conference of State Legislatures, et al. to petitioner's opposition to lodging proposal.

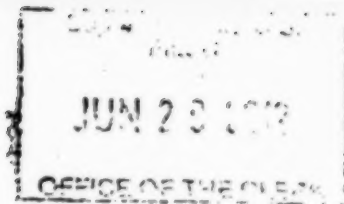
Feb 11 2013 Respondents' letter in support of lodging proposal.

Feb 13 2013 Reply of petitioners Mark J. McBurney, et al. filed. (Distributed)

Feb 20 2013 Argued. For petitioners: Deepak Gupta, Washington, D. C. For respondents: Earle Duncan Getchell, Jr., Solicitor General of Virginia, Richmond, Va.

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**PETITION  
FOR  
WRIT OF  
CERTIORARI**



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IN THE  
**Supreme Court of the United States**

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MARK J. MCBURNEY and ROGER W. HURLBERT,

*Petitioners,*

v.

NATHANIEL YOUNG, JR., Deputy Commissioner and  
Director, Division of Child Support Enforcement,  
Commonwealth of Virginia and THOMAS C. LITTLE,  
Director, Real Estate Assessment Division, Henrico  
County, Commonwealth of Virginia,

*Respondents.*

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On Petition for a Writ of Certiorari to the  
United States Court of Appeals for the Fourth Circuit

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**PETITION FOR A WRIT OF CERTIORARI**

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June 2012

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### **QUESTION PRESENTED**

Under the Privileges and Immunities Clause of Article IV and the dormant Commerce Clause of the United States Constitution, may a state preclude citizens of other states from enjoying the same right of access to public records that the state affords its own citizens?

## LIST OF PARTIES

### **Petitioners:**

Mark J. McBurney

Roger W. Hurlbert

### **Respondents:**

Nathaniel L. Young, Jr.

Deputy Commissioner and Director, Division of Child  
Support Enforcement, Commonwealth of Virginia

Thomas C. Little

Director, Real Estate Assessment Division, Henrico  
County, Commonwealth of Virginia

Plaintiff Bonnie E. Stewart initially sought equitable relief against the Attorney General of the Commonwealth of Virginia in his official capacity. The district court granted the defendants' motion to remove the Attorney General as an improper party, and the Fourth Circuit affirmed that dismissal. Accordingly, Stewart and the Attorney General are no longer parties to this case.

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## INTRODUCTION

This case presents an important question of constitutional law at the intersection of federalism, freedom of information, and the burgeoning marketplace for public records: May a state constitutionally deny to non-residents the same right of access to public records that the state affords its own citizens?

In the decision below, the Fourth Circuit answered yes, upholding a provision of the Virginia Freedom of Information Act that denies non-Virginians the right to access public records that are made freely available to Virginians. The Third Circuit, by contrast, answered no, striking down as facially unconstitutional an identical limitation in Delaware's Freedom of Information Act. *Lee v. Minner*, 458 F.3d 194 (3d Cir. 2006). That head-on circuit split warrants resolution by this Court.

Petitioners challenge Virginia's law under two closely linked provisions of the Constitution—the Privileges and Immunities Clause of Article IV and the dormant Commerce Clause. The former “prevents a State from discriminating against citizens of other States in favor of its own,” *Hague v. CIO*, 307 U.S. 496, 511 (1939), while the latter prohibits “discrimination against interstate commerce.” *W. Lynn Creamery v. Healy*, 512 U.S. 186, 201 (1994).

With respect to the Privileges and Immunities Clause, this case offers the Court an opportunity not only to resolve the split between the Third and Fourth Circuits, but also to clarify an avowedly “uncertain[.]” area of constitutional law that the Court has not grappled with in decades. *Baldwin v. Fish & Game Comm'n of Mont.*, 436 U.S. 371, 395 (1978) (Brennan, J, dissenting). “[B]ecause the Clause has not often been the subject of litigation before this Court, the precise scope of the protection it affords the citizens of each State in their sister



States remains to be decided.” *Id.* Indeed, both the Third and Fourth Circuits, though reaching divergent outcomes, agreed that this Court has provided insufficient guidance on that score.

With respect to the dormant Commerce Clause, the Fourth Circuit’s holding—that the Virginia statute, though facially discriminatory, does not discriminate against *commerce*—likewise merits review because it opens up an irreconcilable conflict with two of this Court’s cases—*Reno v. Condon*, 528 U.S. 141, 148-49 (2000), which holds that public information released into commerce is indeed an “article of commerce,” and *C&A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383, 394 (1994), which requires courts to consider a law’s “practical effect” on commerce, regardless of whether that law explicitly regulates commerce.

Finally, certiorari is warranted because the Fourth Circuit’s decision, if allowed to stand, will impose senseless additional costs on those who request public records, invite selective enforcement, and encourage every state to impose intolerable new burdens on the national market for public information.

### OPINIONS BELOW

The Fourth Circuit’s opinion addressing the merits of the constitutional challenge is reproduced at 1a and reported at 667 F.3d 454. The district court’s decision on the merits is reproduced at 29a and reported at 780 F. Supp. 2d 439. The Fourth Circuit’s earlier opinion with respect to standing is reproduced at 50a and reported at 616 F.3d 393. The district court’s decision on standing is unreported and can be found at 2009 WL 1209037.

### JURISDICTION

The judgment of the court of appeals was entered on February 1, 2012. Pet. App. 3a. On April 25, 2012, Chief



Justice Roberts granted an extension of time within which to file this petition to and including June 29, 2012. This Court has jurisdiction under 28 U.S.C. § 1254(1).

### **STATUTORY PROVISION INVOLVED**

The Virginia Freedom of Information Act (VFOIA) limits the right of access to public records in Virginia to citizens of the Commonwealth and certain media organizations. Va. Code Ann. § 2.2-3704(A) states:

Except as otherwise specifically provided by law, all public records shall be open to inspection and copying by any citizen of the Commonwealth during the regular office hours of the custodian of such records. Access to such records shall not be denied to citizens of the Commonwealth, representatives of newspapers and magazines with circulation in the Commonwealth, and representatives of radio and television stations broadcasting in or into the Commonwealth. The custodian may require the requester to provide his name and legal address. The custodian of such records shall take all necessary precautions for their preservation and safekeeping.

### **STATEMENT OF THE CASE**

Petitioners Mark J. McBurney and Roger W. Hurlbert requested public records under VFOIA but were denied access to those records under a provision of the law limiting the right of access to Virginia citizens. They brought an action in federal district court under 42 U.S.C. § 1983 to require the defendants to process their public-records requests, challenging the law's citizens-only provision under the Privileges and Immunities Clause of Article IV and the dormant Commerce Clause of the United States Constitution.

The district court initially concluded that petitioners lacked standing, but the Fourth Circuit reversed that decision. In a concurrence, Judge Gregory concluded that the citizens-only provision should be subject to heightened scrutiny under the Privileges and Immunities Clause because it discriminates against a nonresident's ability to access information and thus burdens his fundamental right to pursue a common calling.

On remand, the district court held that VFOIA does not violate the Privileges and Immunities Clause or the dormant Commerce Clause. The Fourth Circuit affirmed on the merits with respect to both Clauses, holding—in conflict with the Third Circuit's decision in *Lee v. Minner*, 458 F.3d 194 (3d Cir. 2006)—that access to public records is not a right protected by the Privileges and Immunities Clause.

#### **A. Factual Background**

1. Roger W. Hurlbert is a California citizen and the sole proprietor of Sage Information Services, a company he formed in 1987. 4th Cir. J.A. 46A-47A. Hurlbert earns his living by obtaining public records from real property assessment officials on behalf of private clients. *Id.* The requested documents are often copies of computer-readable databases of property ownership, valuations, land tenure, and land use. *Id.* at 47A. Hurlbert obtains these documents by making requests under state Freedom of Information statutes and negotiating with local officials for the removal of impediments to their release. *Id.* at 47A, 70A. Although he operates his business from California, his clients seek public documents from real property officials nationwide. *Id.* at 46A-47A.

In 2008, a client hired Hurlbert to obtain documents from the Tax Assessor of Henrico County, Virginia. *Id.* at 47A. An official from the office denied Hurlbert's re-

quest because he was not a Virginia citizen. *Id.* Hurlbert no longer requests records in Virginia and has advised his clients that he cannot offer his services there. *Id.* at 47A-48A, 66A, 70A. As a result, he has lost business. *Id.* at 70A.

2. Mark J. McBurney is a Rhode Island citizen who lived in Virginia from 1987 to 2000. *Id.* at 33A. When McBurney's former wife defaulted on her child support obligations, McBurney asked the Virginia Division of Child Support Enforcement (DCSE) to file a petition for child support on his behalf while he was living overseas in Australia. *Id.* at 33A-34A. Although DCSE told McBurney that his petition was filed in August 2006, DCSE did not actually file the petition until April 2007, depriving McBurney of almost nine months of child support payments. *Id.* at 34A-35A.

Believing that DCSE mishandled his child support petition, McBurney submitted a VFOIA request to DCSE in April 2008 seeking "all emails, notes, files, memos, reports, letters, policies, [and] opinions" pertaining to him, his son, his former wife, and his child support application. *Id.* at 36A-39A.

DCSE denied McBurney's request because he was not a citizen of the Commonwealth. *Id.* at 36A. In May 2008, McBurney sent a second VFOIA request seeking the same records—as well as treatises, statutes, legislation, regulations, administrative guidelines and other reference materials relied on by DCSE "when one parent is overseas"—but was again denied access to those records because of the statute's citizens-only provision. *Id.* at 36A, 42A-43A. Though McBurney ultimately received some documents about his case under another state statute, he did not receive all the records sought in his VFOIA requests, including general policy infor-

mation about how DCSE handles cases when a parent lives overseas. Pet. App. 54a.

## **B. Proceedings Below**

1. Petitioners McBurney and Hurlbert filed suit under 42 U.S.C. § 1983 seeking declaratory and injunctive relief against the Attorney General of Virginia, the Deputy Commissioner and Director of the Virginia DCSE, and the Director of the Henrico County Real Estate Assessor's Office.

The complaint alleged that VFOIA's citizens-only provision violates Article IV's Privileges and Immunities Clause and the dormant Commerce Clause by barring petitioners' access to public records on the basis of their lack of Virginia citizenship. First Am. Compl. ¶ 1. Specifically, petitioners maintained that the citizens-only provision denied their right under the Privileges and Immunities Clause to participate in Virginia's governmental and political processes by preventing them from obtaining information from Virginia's government. *Id.* ¶ 32. McBurney also alleged that the citizens-only provision precluded him from advocating effectively on his own behalf and from invoking the dispute resolution procedures needed to resolve his child support application. *Id.* ¶¶ 34-35. Separately, Hurlbert claimed that the provision denied his right to pursue a common calling by preventing him from obtaining public records on an equal basis with Virginia citizens. *Id.* ¶ 36. Hurlbert also claimed that the citizens-only provision violated the dormant Commerce Clause by granting Virginia citizens, but not noncitizens, the right to conduct a public records retrieval business in Virginia. *Id.* ¶ 41.

The respondents moved to dismiss the suit for lack of standing. The district court granted their motions, concluding that both McBurney and Hurlbert lacked stand-



ing to maintain their suit. *McBurney v. Mims*, 2009 WL 1209037, at \*4-6 (E.D. Va. Apr. 29, 2009). The court also summarily addressed the merits of Hurlbert's constitutional claims, ruling that the statute did not violate the Privileges and Immunities Clause or the dormant Commerce Clause. *Id.* at \*6-7.

2. On appeal, the Fourth Circuit reversed the district court's standing determination and remanded for further proceedings on the merits. Pet. App. 64a-68a.

In a concurrence, Judge Gregory discussed the merits at length, explaining that Hurlbert, by alleging that Virginia had denied him information he collects for a profit, had made out "a classic common-calling claim under the Privileges Immunities Clause." *Id.* at 72a. Because "[t]he ability to quickly and efficiently gather and disseminate information is central to a great deal of economic activity," Judge Gregory reasoned, a statute that discriminates against a nonresident's ability to access information "implicates the right to pursue a common calling." *Id.* Accordingly, he concluded, "it is incumbent on the state to prove that the statute withstands heightened scrutiny." *Id.*

3. On remand, the parties cross-moved for summary judgment on the merits. The district court granted Respondents' motions, holding that VFOIA does not violate Article IV's Privileges and Immunities Clause or the dormant Commerce Clause. *Id.* at 36a-49a.

The Fourth Circuit affirmed. The court first held that the citizens-only provision implicates no privilege or immunity protected by Article IV's Privileges and Immunities Clause. Expressly rejecting the Third Circuit's approach in *Lee*, the court concluded that "[a]ccess to a state's records simply does not 'bear[] upon the vitality the Nation as a single entity' such that VFOIA's citizen-

only provision implicates the Privileges and Immunities Clause.” *Id.* at 21a (citation omitted). And although *Lee* invalidated Delaware’s law on its face, the Fourth Circuit purported to distinguish *Lee* on the ground that the court had recognized a right to access only records of “national, political, and economic importance.” *Id.* at 19a. (In the court’s view, petitioners sought only records of “personal import.” *Id.*)

The Fourth Circuit also held that the citizens-only provision does not burden Hurlbert’s right to pursue his common calling in Virginia. Noting that VFOIA on its face “addresses no business, profession, or trade,” the court reasoned that the statute “[a]t most” imposes only an “incidental” effect on Hurlbert by limiting one method by which he may carry out his business. Pet. App. 17a-18a. In the court’s view, this “incidental” effect is insufficient to implicate Hurlbert’s right to pursue a common calling. *Id.* Finally, the court concluded that VFOIA does not infringe—or the Clause does not protect—petitioners’ ability to access state courts or to advocate for their personal, economic, and political interests in Virginia. *Id.* at 22a-23a.

The Fourth Circuit also rejected Hurlbert’s dormant Commerce Clause claim, holding that the district court appropriately applied the less exacting test of *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), to VFOIA’s citizens-only provision. Again, the court reasoned that VFOIA does not discriminate against interstate commerce or out-of-state economic interests because VFOIA is “wholly silent as to commerce or economic interests.” Pet. App. 26a. In the court’s view, VFOIA only prevents Hurlbert from pursuing his chosen method of doing business in Virginia but does not prevent him from engaging in business in Virginia altogether. Pet. App. 27a.

## REASONS FOR GRANTING THE PETITION

### I. The Fourth Circuit's Privileges-and-Immunities-Clause Holding Conflicts With the Third Circuit and Is Wrong on the Merits.

Article IV's Privileges and Immunities Clause provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. CONST. ART IV § 2. Also known as the Comity Clause, it was intended to "place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned," *Paul v. Virginia*, 75 U.S. 168, 180 (1869), and thereby "fuse into one Nation a collection of independent, sovereign States." *Toomer v. Witsell*, 334 U.S. 385, 395 (1948). The Clause relieves the citizens of each state of "the disabilities of alienage in other States" and "inhibits discriminating legislation against them by other states." *Hicklin v. Orbeck*, 437 U.S. 518, 524 (1978).

Analysis under the Clause involves a two-step inquiry. First, a state's discriminatory treatment of non-residents must burden "rights or activities" that are "sufficiently basic to the livelihood of the Nation" to be protected by the Clause. *Baldwin*, 436 U.S. at 388. The second step asks whether the discrimination is justified by a substantial state interest. See *Barnard v. Thornstenn*, 489 U.S. 546, 552 (1989). Without reaching the second step, the Fourth Circuit incorrectly concluded that VFOIA does not burden any right or activity protected by the Clause. That incorrect conclusion brings the Fourth Circuit into conflict with the Third Circuit, is at odds with this Court's jurisprudence, and is wrong on the merits.

### A. The Third and Fourth Circuits Are Split.

The Third and Fourth Circuits have fully considered the constitutionality of identical citizens-only restrictions on the right of access to public records and have reached diametrically opposite conclusions.

In *Lee v. Minner*, the Third Circuit struck down the Delaware Freedom of Information Act's citizens-only provision, holding that "access to public records is a right protected by the Privileges and Immunities Clause." 458 F.3d at 200. Because the Delaware law facially discriminated against noncitizens' exercise of that right and was not justified by any substantial state interest, it was unconstitutional in all respects and the court enjoined its enforcement. *Id.* at 200-02. The Third Circuit recognized that this Court's cases leave the lower courts with "limited guidance" concerning the scope of the Clause, but reasoned from "basic principles" distilled from the existing case law. *Id.* Reasoning that access to public records is necessary to the ability to engage in political advocacy—an "essential activity" that "bear[s] upon the vitality of the Nation as a single entity," *id.* at 200 (quoting *Baldwin*, 436 U.S. at 387, 383), the court "conclude[d] that access to public records is a right protected by the Privileges and Immunities Clause." *Id.*

By contrast, the Fourth Circuit below rejected *Lee*'s holding and concluded that the right of access identified in *Lee* is not a fundamental right protected by the Privileges and Immunities clause. Pet. App. 21a. The Fourth Circuit, on that basis, upheld VOIA's indistinguishable citizens-only provision, holding that "[a]ccess to a state's records simply does not 'bear[] upon the vitality of the Nation as a single entity' such that VFOIA's citizen-only provision implicates the Privileges and Immunities Clause." *Id.* The court rejected *Lee* as "out-of-circuit au-



thority" that is "not binding on this Court" and emphasized that the right of public access recognized in *Lee* "is not one previously recognized by the Supreme Court." *Id.* at 19a.

The Fourth Circuit, in the alternative, attempted to distinguish *Lee* on its facts, interpreting the right identified by the Third Circuit as limited to "engag[ing] in the political process with regard to matters of both national political and economic importance." *Id.* at 19a. But that dicta cannot sweep aside the circuit split. Although *Lee* clarified that access to public records is a prerequisite to engaging in political advocacy, the Third Circuit stated—in no uncertain terms—that "access to public records is a [fundamental] right protected by the Privileges and Immunities Clause." 458 F.3d at 200.

It bears emphasis that the Third Circuit enjoined enforcement of Delaware's citizens-only provision in *all circumstances*, not only as applied to individuals invoking the statute for political advocacy on matters of national political and economic importance. *Id.* at 201-02. Thus, by holding that "[a]ccess to a state's records simply does not . . . implicate[] the Privileges and Immunities Clause" and upholding the citizens-only provision in VFOIA (Pet. App. 21a), the Fourth Circuit's decision below conflicts with the Third Circuit's decision in *Lee* on the important question whether a state may constitutionally deny individuals the right of access to public records based on state citizenship.

The split between the Third and Fourth Circuits concerning the constitutionality of citizens-only restrictions—coupled with the lack of guidance from this Court—exacerbates the already unclear state of the law. Just this month, in a case challenging the constitutionality of the citizens-only restriction of the Arkansas Free-

dom of Information Act under the Privileges and Immunities Clause, the Eighth Circuit acknowledged that the Third and Fourth Circuits have reached diametrically opposite conclusions on the question, but declined to reach the challenge because the challengers had failed to preserve it in the district court. See *Aamodt v. City of Norfolk, Ark.*, — F.3d —, 2012 WL 2369109, at \*2 (8th Cir. June 25, 2012). This leaves the law in a confused state. Last year, in response to a constitutional challenge, the Arkansas Auditor and State Highway and Transportation Department agreed to honor all FOIA requests by out-of-state residents. *Belth v. Daniels*, No. 4-11-cv-009-JMM (E.D. Ark. May 16, 2011), Doc. No. 16, Exh. 1 (settlement agreement). Yet the Arkansas Attorney General continues to assert its prerogative to enforce the state's citizens-only restriction on behalf of other state agencies. See Ark. Op. Att'y Gen. No. 2012-017 (Feb. 10, 2012). Meanwhile, the same Attorney General has opined that, in light of *Lee's* "extensive analysis of a government action that treats FOIA requestors differently based solely on residence, a court would likely invalidate" a plan by an Arkansas county to distinguish between county and non-county residents in deciding how much to charge for access to a public records website. Ark. Op. Att'y Gen. No. 2011-060 (Aug. 1, 2011). These positions are, to put it mildly, hard to square.

In Tennessee, the state of confusion was recently illustrated by a federal district court's unsuccessful struggle to harmonize the decisions of the Third and Fourth Circuits in a pending constitutional challenge to the citizens-only provision of the Tennessee Public Records Act. That court initially declined to dismiss the challenge "[i]n light of *Lee* and *McBurney*," reasoning that "the only two circuit courts to address the issue have found, whether explicitly or implicitly," that the Privileges and

Immunities Clause protects a right to obtain records necessary to engage in the political process on issues of national importance. *Jones v. City of Memphis*, — F. Supp. 2d —, 2012 WL 465169, at \*10 (W.D. Tenn. Feb. 13, 2012). But several months later the same court granted the defendants' motion for summary judgment, finding the Tennessee law "analogous to the Virginia provision at issue in *McBurney*" and limiting *Lee* to its facts. *Jones v. City of Memphis*, 2012 WL 1228181, at \*5-13 (W.D. Tenn. Apr. 11, 2012). That case is now on appeal to the Sixth Circuit, and a decision there can only deepen the split, not resolve it. In the meantime, Tennessee adheres to its longstanding position that its citizens-only provision does not violate the Privileges and Immunities Clause. See Tenn. Att'y Gen. Op., No. 99-067 (Mar. 18, 1999) (addressing constitutional arguments).

Still other states, like Georgia, have provided non-citizen access as a policy matter but reserved the statutory right to withhold that access. See Ga. Op. Att'y Gen. No. 93-27 (Dec. 15, 1993) ("While the Code section on its face extends the absolute right of inspection only to citizens of Georgia, it is my opinion that inspection of otherwise public records should not be denied merely because the requester is a nonresident of this state.").<sup>1</sup> Even in Virginia, different agencies appear to have widely different policies about whether, and under what circumstances, to honor requests by non-Virginians. See *Report of the Virginia Freedom of Information Advisory Council to the Governor and the General Assembly of Virginia* 5-6 (2010), available at <http://foiacouncil.dls.virginia.gov/2010ar.pdf>.

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<sup>1</sup> Amendments in April 2012 removed the references to citizens. See [http://www1.legis.ga.gov/legis/2011\\_12/fulltext/hb397.htm](http://www1.legis.ga.gov/legis/2011_12/fulltext/hb397.htm).

For those who frequently obtain, sell, buy, and use public records, for citizens and journalists who make occasional requests, and for the state officials who process those requests, the state of the law is intolerable. A researcher seeking to conduct a 50-state survey concerning state participation in a federal program, for example, will have the right to obtain records on the same terms as in-state residents in some states, such as California, Delaware, New York, and New Jersey, but not in others, such as Arkansas, New Hampshire, Tennessee, or Virginia (unless they pay an in-state proxy to do so), and will have uncertain rights of access in still other states. Whatever else these restrictions are intended to accomplish, they certainly do not "place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned." *Paul*, 75 U.S. at 180.

**B. Virginia Bars Noncitizens from Obtaining Public Records to Scrutinize Official Decisions and Protect Property—Activities Basic To the Livelihood of the Nation as a Single Entity.**

The Privileges and Immunities Clause ensures that citizens of one state can travel through, temporarily reside in, and do business in other states without suffering a "condition of alienage" before the governments of other states. *Blake v. McClung*, 172 U.S. 239, 248-50, 256 (1898). Americans' right to "take, hold and dispose of property, either real or personal" in every state in the Union has always been considered one of the most fundamental rights protected by the Clause. *Baldwin*, 436 U.S. at 384 (citing *Corfield v. Coryell*, 6 F. Cas. 546, 552 (C.C. E.D. Pa. 1825) (opinion of Washington, J.)). The Clause also secures to noncitizens the right to sue in an-



other state's courts, *Canadian Northern R. Co. v. Eggen*, 252 U.S. 553 (1920), to claim the writ of habeas corpus, *Baldwin*, 436 U.S. at 384 (citing *Corfield*, 6 F.Cas. at 552), to be free from discriminatory regulation of their profession, *Supreme Court of Va. v. Friedman*, 487 U.S. 59, 65 (1988), to purchase the same services available to state citizens, *Doe v. Bolton*, 410 U.S. 179, 200 (1973), and to be treated the same by tax and bankruptcy authorities, *Austin v. New Hampshire*, 420 U.S. 656, 660-68 (1975).

Access to public records—including the property and administrative records sought by the petitioners here—is vital to exercising any of these rights, and to securing any number of personal, economic, and political interests that a citizen of one state may have in another. Open records laws take the place of, and supplement, the longstanding “general right to inspect and copy public records and documents,” recognized in both English and American common law. *Nixon v. Warner Commc’ns.*, 435 U.S. 589, 597-98 (1978). The basic purpose of these laws—to let the people know what the “Government is up to”—“should not be dismissed as a convenient formalism” but instead “defines a structural necessity in a real democracy.” *Nat’l Archives and Records Admin. v. Favish*, 541 U.S. 157, 171-72 (2004). Virginia itself recognized when it enacted VFOIA that the public should have access to government records because the “affairs of government” should not be “conducted in an atmosphere of secrecy.” Va. Code Ann. § 2.2-3700. By denying citizens of other states equal access to state records, Virginia subverts these principles, hinders the ability of noncitizens to protect their economic and other interests, and unconstitutionally undermines the vitality of the Nation as a single entity.

For instance, a noncitizen seeking real property records, like those sought by Hurlbert, has no right to obtain those records—even if he or she is considering purchasing real estate in the Commonwealth and wants to check the title and ownership. That result is hard to square with “the first reported judicial construction of the Privileges and Immunities Clause,” in which Justice Samuel Chase explained that “one of the chief motivations for the inclusion of the analogous provision in the Articles was to secure the rights of real property ownership.” David R. Upham, *Corfield v. Coryell and the Privileges and Immunities of American Citizenship*, 83 TEX. L. REV. 1483, 1493 (2005) (citing *Campbell v. Morris*, 3 H. & McH. 535 (Md. 1797)).

The rationale for protecting other rights—including the right to access the courts—is that they help secure property rights. See ROGER HOWELL, *THE PRIVILEGES AND IMMUNITIES OF STATE CITIZENSHIP* 48 (1918). The public’s ability to obtain the sort of basic real estate title records sought by Hurlbert is just as essential as access to courts for facilitating the orderly acquisition, ownership, and transfer of property. Today, as in the founding era, an “important aspect of market exchange is the question of whether the seller of a good is the true owner”—a question that, with respect to real estate, can only be answered by resort to public records. Matthew Baker, et al, *Optimal Title Search*, 31 J. LEGAL STUD. 139, 139 (2002); see also Emily Bayer-Pacht, *The Computerization of Land Records*, 32 CARDOZO L. REV. 337, 337 (2010) (explaining that the “system of publicly recording land title documents originated in the United States in 1640, in the Plymouth and Massachusetts Bay Colonies,” and is now accessed through computerized searches).

Similarly, access to records of state administrative

processes is often essential to protecting private property interests as well as conducting advocacy on issues of national importance—issues that may often come to light through an individual's personal experience with government. For example, petitioner McBurney sought records relating not only to the Commonwealth's failure to promptly handle his own application for child support, but also to its general policies for handling applications from overseas parents. State treatment of child support applications from overseas parents is a national policy issue with "significant consequences for families and children" and increased "relevance in foreign relations." Ann Laquer Estin, *Families Across Borders: The Hague Children's Conventions and The Case for International Family Law in the United States*, 62 Fla. L. Rev. 47, 48 (2010). With 6.6 million American citizens living abroad, it is not surprising that "many of these Americans will face challenging international family law problems," which "[n]ational and local laws are inadequate" to address. *Id.* Indeed, Congress is currently considering legislation that addresses the states' treatment of child support applications from overseas parents. *H.R. 4282: International Child Support Recovery Improvement Act of 2012*, <http://www.govtrack.us/congress/bills/112/hr4282> (last visited June 26, 2012).

Whether pursuing their own interests through governmental processes or lobbying on behalf of others, non-Virginians like McBurney are denied the right that Virginians enjoy to obtain public information about the government's existing policies and procedures. Virginia, in effect, treats noncitizens as aliens in their own country, refusing to provide them with information the Commonwealth admits is vital to its own citizens.

In addition to burdening the individual interests of noncitizens—and by extension, the free movement of people and commerce across state lines—VFOIA hinders the Nation's vitality and development as one political community. Virginia's public records are valuable not only to citizens of the Commonwealth, but also to citizens of other states involved in political advocacy in their home states, in other states, or at the national level. As the Third Circuit observed, "events which take place in an individual state may be relevant to and have an impact upon policies of not only the national government but also of the states." *Lee*, 458 F.3d at 199-200. "Public records compiled from many states often reveal national trends or evidence of large-scale malfeasance not necessarily apparent through the examination of information from a single state." 4th Cir. Br. Amici Curiae of Reporters' Comm. for Freedom of the Press at 11-12. Many federal programs are administered in part by the states, which means that state-level information is critical to assessing them. In recent years, records obtained through state FOIA requests have exposed problems with state administration of federal laws, such as the "No Child Left Behind" Act, leading to national policy discussions. *Id.* at 12-14. By denying noncitizens the right to access public records, the Commonwealth deprives citizens of other states the opportunity to scrutinize—and learn from—its public policies and actions. This kind of isolationism threatens "the vitality of the Nation as a single entity." *Baldwin*, 436 U.S. at 383.

It is true that not every citizenship classification affects interests important enough to require scrutiny under the Clause. Thus, a state may restrict some activities, such as recreational elk hunting, to its own citizens. *See id.* at 388. But this case is far removed from elk hunting. Access to public information is not only closely re-



lated to other state rights that must be provided equally to noncitizens—such as the right to acquire and hold property, sue in state courts, or be free of discriminatory state regulations—but fundamental to our democratic and federalist system of government. The Fourth Circuit's failure to provide any reasoning to support its perfunctory conclusion to the contrary underscores its error and the need for this Court's review.

**C. Virginia Bars Noncitizens From the Records-Retrieval Business and Burdens Other Common Callings.**

This Court has long recognized that “one of the privileges which the Clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State.” *Supreme Court of N.H. v. Piper*, 470 U.S. 274, 280 (1985) (quoting *Toomer*, 334 U.S. at 396). VFOIA burdens noncitizens' ability to do business in Virginia, and the Fourth Circuit's reasons for finding otherwise conflict with the Court's precedents and the purpose of the Clause.

The procurement, compilation, and publication of public records is a major industry. See Part III, *infra*. The practical effect of VFOIA is to deny noncitizens the ability to pursue that business within Virginia on equal footing with Virginia residents and to immunize records-retrieval businesses owned by Virginia citizens from out-of-state competitors like petitioner Hurlbert.<sup>2</sup> “The Privileges and Immunities Clause was designed primari-

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<sup>2</sup> See Public Record Retriever Network, Membership List for 2012: Virginia, <http://www.brpbpublications.com/prrn/search.aspx> (16 Virginia companies offering public records retrieval services).

ly to prevent such economic protectionism." *Piper*, 470 U.S. at 285 n.18.

Not only does VFOIA completely exclude noncitizens from competing in the Virginia records-retrieval business, it also burdens virtually any other kind of non-citizen business owner who enters the Virginia market. Freedom of Information statutes are a crucial source of information for commercial entities, who use them to challenge government regulations, to obtain information about government licensing or contract decisions, and to obtain public information about competitors, among other purposes. "The vast majority of FOIA requests are made by businesses for commercial purposes." Daniel J. Solove, *Access and Aggregation: Public Records, Privacy and the Constitution*, 86 Minn. L. Rev. 1137, 1196 (2002). By denying out-of-state business owners the right to access public records, but granting that right to Virginia business owners, Virginia burdens noncitizens with a competitive disadvantage in the Virginia market. Again, the Privileges and Immunities Clause was intended to prevent this kind of economic discrimination.

Despite these burdens on noncitizen businesses, the Fourth Circuit concluded that VFOIA escapes review under the Clause because "[o]n its face . . . VFOIA addresses no business, profession, or trade" and, therefore, its effect on Hurlbert's business is merely "incidental." Pet. App. 17a-18a. This rationale is wrong for two reasons. First, VFOIA does not impose an "incidental" burden on Hurlbert's business in Virginia. Quite the contrary, as explained above, the statute prevents him from doing business there altogether.

Second, nothing in the history of the Privileges and Immunities Clause suggests that a state may burden a common calling so long as it avoids saying that is what it

is doing. For example, a state could not constitutionally pass a law that limits the amount of fish that only noncitizens may catch. Even if such a law applies to both recreational and commercial fishing, and even if its intention is to protect in-state fisheries, its effect would be to discriminate against out-of-state fisherman. The same is true for public records laws. *See* Pet. App. 72a (Gregory, J., concurring) ("A statute that discriminates against a nonresident's ability to access information therefore implicates the right to pursue a common calling in the Twenty-First century in much the same way that it would if it burdened an angler's ability to catch fish, or a cabby's ability to drive fares, in the Twentieth.") (citations omitted). VFOIA's failure to specifically mention noncitizen business owners does not lessen its discriminatory purpose or effect. *Cf. United Bldg. & Constr. Trades v. Camden*, 465 U.S. 208, 216-17 (1984) (holding that a municipal hiring preference that discriminated against people not residing in the city by definition discriminated against out-of-state residents).

At bottom, what matters is that the law has the "practical effect" of discriminating against out-of-state businesses like Hurlbert's. *See Hillside Dairy Inc. v. Lyons*, 539 U.S. 59, 67 (2003). Just as the "absence of an express statement . . . identifying out-of-state citizenship as a basis for disparate treatment is not a sufficient basis for rejecting [a Privileges and Immunities] claim," *id.*, the absence of an express statement identifying noncitizen business owners for disparate treatment is not sufficient to reject petitioners' Privileges and Immunities claim.

## II. The Fourth Circuit's Decision Is at Odds With This Court's Dormant Commerce Clause Cases.

This Court should also grant certiorari to review the Fourth Circuit's erroneous decision to apply the less rigorous dormant Commerce Clause analysis set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), instead of the "virtually per se rule of invalidity" applicable to statutes, like VFOIA, that discriminate against out-of-state economic interests. See *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). That holding warrants review not only because it conflicts with this Court's cases, but also because of "the mutually reinforcing relationship between the Privileges and Immunities Clause of Art. IV, § 2, and the Commerce Clause—a relationship that stems from their common origin in the Fourth Article of the Articles of Confederation and their shared vision of federalism." *Hicklin*, 437 U.S. at 531-32. As Judge Posner has observed, "[t]he commerce clause and the privileges and immunities clause are so closely related in a case of this kind that it would be artificial to ignore one of them." *W.C.M. Window Co., Inc. v. Bernardi*, 730 F.2d 486, 496 (7th Cir. 1984) (citation omitted).

This Court has repeatedly held that a statute is presumptively invalid if it discriminates against interstate commerce or out-of-state economic interests either facially or in effect. *E.g.*, *Wyoming v. Oklahoma*, 502 U.S. 437, 455 (1992); *Philadelphia*, 427 U.S. at 627. Discrimination under the dormant Commerce Clause "means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Or. Waste Sys., Inc. v. Dep't of Env'tl. Quality of State of Or.*, 511 U.S. 93, 99 (1994) (citations omitted). Differential treatment is inherent in VFOIA's citizens-

only provision, which discriminates against out-of-state economic interests *both* facially and in effect.

1. On its face, VFOIA provides that “all public records shall be open to inspection and copying by any citizen of the Commonwealth” and that “[a]ccess to such records shall not be denied to citizens of the Commonwealth.” Va. Code Ann. § 2.2-3704(A). By expressly guaranteeing access to public records only to Virginia citizens while authorizing officials to bar noncitizens from such access, the statute facially discriminates against the economic interests of out-of-state businesses who, like Hurlbert, wish to participate in the Virginia records-retrieval market. The Fourth Circuit acknowledged that “VFOIA discriminates against noncitizens of Virginia” on its face, but erroneously concluded that it does not regulate “the flow of interstate commerce—the flow of goods, materials, and other articles of commerce across state lines.” Pet. App. 26a-27a (citation and emphasis omitted).

That conclusion cannot be reconciled with *Reno v. Condon*, 528 U.S. 141, 148-49 (2000), in which this Court unanimously held that public drivers’ records regulated by the Drivers’ Privacy Protection Act are “article[s] of commerce” under the Commerce Clause because they are sold, compiled into databases, and resold for various commercial purposes. Because the Commonwealth’s information is “used in the stream of interstate commerce by various public and private entities,” its “sale or release into the interstate stream of business” constitutes interstate commerce under the Commerce Clause. *Id.*; see also *Hicklin*, 437 U.S. at 532 (“[T]he Commerce Clause circumscribes a State’s ability to prefer its own citizens in the utilization of ... a state-owned resource [that] is destined for interstate commerce.”). Thus, the



Fourth Circuit's assertion that "VFOIA is wholly silent as to commerce or economic interests" (Pet. App. 26a) is simply wrong.

By its terms, VFOIA does not afford Virginia businesses the right of access to public documents and thus prevents out-of-state businesses from competing in the market for Virginia public records without incurring added costs—such as hiring in-state employees to retrieve the desired records—or becoming a citizen of the Commonwealth. But as this Court has held, "the mere fact of nonresidence should not foreclose a producer in one State from access to markets in other States." *Granholm v. Heald*, 544 U.S. 460, 472 (2005) (citing *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 539 (1949)).

2. The citizens-only provision also discriminates in effect because it "favor[s] in-state economic interests over out-of-state interests." *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986). This Court has long recognized that "in each case it is [the Court's] duty to determine whether the statute under attack . . . will in its practical operation work discrimination against interstate commerce." *W. Lynn Creamery*, 512 U.S. at 201 (quoting *Best & Co. v. Maxwell*, 311 U.S. 454, 455-456 (1940)). The Fourth Circuit ignored that duty, first, by declining to consider at all the practical operation of VFOIA's citizens-only provision on interstate commerce and out-of-state economic interests and, second, by asserting without explanation that "any effect [of VFOIA] on commerce is incidental." Pet. App. 26a.

The Fourth Circuit's approach is wrong. VFOIA's citizens-only provision harms out-of-state businesses that have economic interests in retrieving public records in Virginia. By denying business entities in every other

state the right to Virginia public records but permitting identical in-state businesses to retrieve the same exact records on demand, VFOIA has the effect of placing out-of-state businesses, like Hurlbert's, at a disadvantage compared to in-state businesses.

Moreover, the Fourth Circuit's approach is at odds with this Court's command that "the practical effect of the statute must be evaluated . . . by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation." *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989). If every state were to adopt a citizens-only provision in its FOIA law, interstate commerce in the document retrieval market would come to a halt, and in-state economic interests would *de facto* be prioritized over out-of-state interests. Thus, under *Healy*, VFOIA's citizens-only provision has a discriminatory effect on interstate commerce and out-of-state economic interests.

Rather than evaluate the practical effect of VFOIA's citizens-only provision, the Fourth Circuit rescued the statute from rigorous review on the theory that VFOIA's purpose is not to erect protectionist barriers or discriminate against interstate commerce but to combat government secrecy. Pet. App. 26a. But purpose is irrelevant—as made clear by the Fourth Circuit's failure to cite any authority supporting its assertion. Because VFOIA's citizens-only provision discriminates against out-of-state economic interests on its face and in effect, "the virtually *per se* rule of invalidity provides the proper legal standard here, not the *Pike* balancing test." *Or. Waste Sys., Inc.*, 511 U.S. at 100.

The Fourth Circuit's ruling below departs from this Court's holding in *C & A Carbone, Inc. v. Town of*

*Clarkstown, N.Y.*, 511 U.S. 383, 394 (1994). There, this Court invalidated a flow control ordinance requiring that all local trash be processed in the town's transfer station before leaving the municipality. 511 U.S. at 386. The Court explained that the local government's policy discriminated against out-of-state processing facilities by requiring garbage to be processed in the town and thus had the effect of establishing a local monopoly over the "initial processing step" of the town's garbage. *See id.* at 392. In doing so, the statute produced economic effects that "were interstate in reach." *Id.* at 389.

Similar to the flow control ordinance in *Carbone*, VFOIA's citizens-only provision denies noncitizens and out-of-state businesses access to the market for Virginia document retrieval. The provision reserves the "initial processing step" of document retrieval to local businesses, denying out-of-state businesses primary access to that market in much the same way that the flow control ordinance in *Carbone* denied out-of-state haulers entry into the market for the initial processing of local garbage. Under VFOIA, Hurlbert either would have to hire a Virginia citizen or business to obtain Virginia public records or refrain from carrying out his document retrieval business in Virginia altogether. As a result of the added burdens imposed on his economic interests by the citizens-only provision, Hurlbert no longer does business in Virginia. 4th Cir. J.A. 47A-48A, 66A, 70A.

Thus, contrary to the Fourth Circuit's assertion that VFOIA only "prevents Hurlbert from using his 'chosen way of doing business'" (Pet. App. 27a), VFOIA discriminates against Hurlbert's *only* way of doing business in Virginia, and likewise burdens other out-of-state document retrieval businesses seeking to enter the market. Under *Carbone*, that type of discrimination "in favor of



local business or investment is *per se* invalid" absent Virginia's ability to "demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest." *Carbone*, 511 U.S. 383 at 392 (citations omitted). In sum, the Fourth Circuit eschewed *Carbone*'s command to apply rigorous scrutiny to statutes, like VFOIA, that discriminate facially and in effect, and the Court should grant certiorari for that reason as well.

### III. The Question Presented Is of Substantial National Importance.

The market for public information is of increasing importance to the national economy. "Once scattered about the country, now public records are consolidated by private sector entities into gigantic databases." Solove, *Access and Aggregation: Public Records, Privacy, and the Constitution*, 86 MINN. L. REV. at 1139. Searches that in the past would require "a treasure hunt around the country to a series of local offices to dig up records" can now be accomplished in seconds. *Id.* Electronic databases of public records are used to investigate credit risks, screen job applicants, purchase property, and evaluate insurance risks. Even law enforcement agencies, rather than attempt to find a needle in a haystack, search private commercial databases of public records to combat everything from terrorism and violent crime to health care fraud.<sup>3</sup> Journalists use public rec-

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<sup>3</sup> See Dep'ts of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations for Fiscal Year 2000: Hearing on H.R. 2670/S. 1217 Before a Subcom. of the S. Comm. on Appropriations, 106 Cong. 280 (1999) (Statement of Louis Freeh, Director, FBI) (noting that "[t]he FBI subscribes to various commercial on-line databases ... to obtain public source information" for investigations).

ords databases to conduct data-intensive investigations into issues of national importance—from financial fraud to official corruption—that “would be virtually impossible” without databases. Brooke Barnett, *Use of Public Record Databases in Newspaper and Television Newsrooms*, 53 FED. COMM. L. J. 557, 566 (2001). And companies generate billions of dollars in annual revenue by selling access to these databases to businesses, governments, journalists, and consumers.<sup>4</sup>

Noncitizen restrictions in state open records laws burden this national market with inefficiencies, inequity, and opportunities for improper official conduct. To be complete, national databases must contain records from all 50 states. As a practical matter, the restrictions force out-of-state requesters to hire an in-state proxy to obtain the public information they need. See Kushal R. Desai, *Lee v. Minner: The End of Non-Citizen Exclusions in State Freedom of Information Laws?*, 58 ADMIN. L. REV. 235, 244 & n.62 (2006); *Atchison v. Hospital Auth.*, 245 Ga. 494, 494 (1980) (despite Georgia citizens-only provision, Georgia employee of Florida corporation could act as corporation’s proxy for purposes of public-records request). This extra cost imposes a competitive disadvantage on out-of-state records-retrieval professionals—especially small business owners like Hurlbert.

Citizens-only restrictions in open records laws also invite selective enforcement, allowing public officials to

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<sup>4</sup> See Reed Elsevier, *Annual Report 2011, Business Review*, Lexis Nexis Legal & Professional, <http://reporting.reedelsevier.com/ar11/business-review/lexisnexis-legal-professional/>; Frederic Lardinois, *Ancestry.com Acquires Archives.com For \$100 Million*, Techcrunch.com (Apr. 25, 2012), <http://techcrunch.com/2012/04/25/ancestry-com-acquires-archives-com-from-inflection-for-100-million>.

deny requests based on their content or source. *See Davidian v. O'Mara*, 210 F.3d 371 (6th Cir. 2000) (allegations that city officials used citizens-only restriction to retaliate against critical journalist); Desai, *Non-Citizen Exclusions*, 58 ADMIN. L. REV. at 244 n.62 (reporting that citizens-only restrictions are "enforced sometimes and not enforced at other times"). Or officials may use the restrictions as a bargaining chip to impose additional fees or delay on noncitizen requesters. *See Report of the Virginia Freedom of Information Advisory Council* at 5 (reporting that one agency often "negotiates a deal" with the noncitizen data aggregators that request records). Improper official conduct can also burden citizen requesters, who may face "undue inconvenience and invasion of privacy" from public officials seeking to "verify the necessary citizenship or media relationships." Charles Bonner, *Annual Survey of Virginia Law: Administrative Procedure*, 33 U. RICH. L. REV. 727, 730 (1999).

There is simply no justification for imposing these discriminatory burdens on noncitizens—and the Fourth Circuit conspicuously did not identify any. Virginia's FOIA allows public officials to recoup the costs of reproducing records, so "government officials cannot reasonably fear inundation by a large volume of requests from persons or media lacking substantial ties with the Commonwealth." *Id.* at 731. Indeed, that some states have eliminated their citizens-only provisions over the past several decades underscores their lack of justification. *See Desai, Non-Citizen Exclusions*, 58 ADMIN. L. REV. at 245 n.63.

Because citizens-only laws like Virginia's impose unjustifiable burdens on the public information industry, and because the Fourth Circuit's erroneous decision has

exacerbated confusion concerning their constitutionality, this Court should grant the petition, resolve the circuit split, and restore certainty to the marketplace for public information.

### CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 2012

## **APPENDIX**

PUBLISHED

UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

MARK J. MCBURNEY; ROGER  
W. HURLBERT,

*Plaintiffs-  
Appellants,*

and

BONNIE STEWART, Professor,

*Plaintiff,*

v.

No. 11-1099

NATHANIEL L. YOUNG, Deputy  
Commissioner and Direc-  
tor, Division of Child Support  
Enforcement, Commonwealth  
of Virginia; THOMAS C. LIT-  
TLE, Real Estate Assessment  
Division, Henrico County,  
Commonwealth of Virginia,

*Defendants-  
Appellees,*

and

HON. KENNETH T. CUCCI-  
NELLI, II, Attorney General,  
Commonwealth of Virginia;  
HON. SAMUEL A. DAVIS, Real  
Estate Assessment Division,  
Henrico County, Common-

wealth of Virginia,

*Defendants.*

THE REPORTERS COMMITTEE  
FOR FREEDOM OF THE PRESS;  
AMERICAN SOCIETY OF NEWS  
EDITORS; ASSOCIATION OF  
CAPITOL REPORTERS AND  
EDITORS; CITIZEN MEDIA  
LAW PROJECT; THE E. W.  
SCRIPS COMPANY; FIRST  
AMENDMENT COALITION;  
HEARST CORPORATION; MAG-  
AZINE PUBLISHERS OF AMER-  
ICA, INCORPORATED; MARY-  
LAND D.C. DELAWARE  
BROADCASTERS ASSOCIA-  
TION; NBC UNIVERSAL ME-  
DIA, LLC; THE NATIONAL  
PRESS CLUB; NATIONAL  
PRESS PHOTOGRAPHERS AS-  
SOCIATION; NPR, INCORPO-  
RATED; NEWSPAPER ASSOCI-  
ATION OF AMERICA; THE  
NEWSPAPER GUILD; NORTH  
JERSEY MEDIA GROUP, IN-  
CORPORATED; RADIO TELEVI-  
SION DIGITAL NEWS ASSOCI-  
ATION; SOCIETY OF PROFES-  
SIONAL JOURNALISTS; STU-  
DENT PRESS LAW CENTER;  
TIME, INCORPORATED; VIR-  
GINIA COALITION FOR OPEN  
GOVERNMENT; THE WASH-



INGTON POST,

*Amici Supporting Appel-  
lants,*

LOCAL GOVERNMENT AT-  
TORNEYS OF VIRGINIA, IN-  
CORPORATED; VIRGINIA MU-  
NICIPAL LEAGUE; VIRGINIA  
ASSOCIATION OF COUNTIES,

*Amici Supporting Appel-  
lees.*

Appeal from the United States District Court for the  
Eastern District of Virginia, at Richmond.

James R. Spencer, Chief District Judge.

(3:09-cv-00044-JRS)

Argued: October 25, 2011

Decided: February 1, 2012

Before NIEMEYER, GREGORY, and AGEE,  
Circuit Judges.

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Affirmed by published opinion. Judge Agee wrote the  
opinion, in which Judge Niemeyer and Judge Gregory  
joined.

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## COUNSEL

**ARGUED:** Leah Marie Nicholls, INSTITUTE FOR  
PUBLIC REPRESENTATION, Georgetown Universi-  
ty Law Center, Washington, DC, for Appellants. Earle  
Duncan Getchell, Jr., OFFICE OF THE ATTORNEY



GENERAL, Richmond, Virginia; Benjamin Adelbert Thorp, IV, OFFICE OF THE COUNTY ATTORNEY, Henrico, Virginia, for Appellees. **ON BRIEF:** Stephen W. Bricker, BRICKER LAW FIRM, PC, Richmond, Virginia; Brian Wolfman, INSTITUTE FOR PUBLIC REPRESENTATION, Georgetown University Law Center, Washington, DC, for Appellants. Kenneth T. Cuccinelli, II, Attorney General, Stephen R. McCullough, Senior Appellate Counsel, Craig M. Burshem, Senior Assistant Attorney General, OFFICE OF THE ATTORNEY GENERAL, Richmond, Virginia; Joseph P. Rapisarda, Jr., County Attorney, Karen M. Adams, Senior Assistant County Attorney, OFFICE OF THE COUNTY ATTORNEY, Henrico, Virginia, for Appellees. Lucy A. Dalglish, Mark R. Caramanica, Christine L. Beckett, THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, Arlington, Virginia, for Amici Supporting Appellants; Kevin M. Goldberg, FLETCHER, HEALD & HILDRETH, PLC, Arlington, Virginia, for American Society of News Editors, Association of Capitol Reporters and Editors, and Maryland D.C. Delaware Broadcasters Association; David Ardia, Citizen Media Law Project, Berkman Center for Internet & Society, Cambridge, Massachusetts, for Citizen Media Law Project; David M. Giles, Cincinnati, Ohio, for The E.W. Scripps Company; Peter Scheer, First Amendment Coalition, San Rafael, California, for First Amendment Coalition; Jonathan R. Donnellan, HEARST CORPORATION, New York, New York, for Hearst Corporation; Christopher J. Nolan, New York, New York, for Magazine Publishers of America, Incorporated; Beth R. Lobel, NBCUniversal Media, LLC, New York, New York, for NBCUniversal Media, LLC; Charles D. Tobin, HOLLAND & KNIGHT LLP, Washington, D.C., for The National Press Club; Mickey H. Osterreicher, Buffalo, New York, for National Press

Photographers Association; Joyce Slocum, Denise Leary, Ashley Messenger, Washington, D.C., for NPR, Incorporated; Rene P. Milam, Arlington, Virginia, for Newspaper Association of America; Barbara L. Camens, BARR & CAMENS, Washington, D.C., for The Newspaper Guild-CWA; Jennifer Borg, General Counsel, NORTH JERSEY MEDIA GROUP INC., Hackensack, New Jersey, for North Jersey Media Group, Incorporated; Kathleen A. Kirby, WILEY REIN LLP, Washington, D.C., for Radio Television Digital News Association; Bruce W. Sanford, Bruce D. Brown, Laurie A. Babinski, BAKER & HOSTETLER LLP, Washington, D.C., for Society of Professional Journalists; Frank D. LoMonte, STUDENT PRESS LAW CENTER, Arlington, Virginia, for Student Press Law Center; Andrew Lachow, Vice President and Deputy General Counsel-Litigation, TIME INC., New York, New York, for Time, Incorporated; Megan Rhyne, VIRGINIA COALITION FOR OPEN GOVERNMENT, Williamsburg, Virginia, for Virginia Coalition for Open Government; Eric N. Lieberman, James A. McLaughlin, Washington, D.C., for The Washington Post, Amici Supporting Appellants. R. Lucas Hobbs, ELLIOTT LAWSON & MINOR, PC, Bristol, Virginia, for Amici Supporting Appellees.

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## OPINION

AGEE, Circuit Judge:

Mark J. McBurney and Roger W. Hurlbert (collectively "Appellants") appeal the district court's award of summary judgment to the Deputy Commissioner and Director of the Division of Child Support Enforcement for the Commonwealth of Virginia and the Director of the Real Estate Assessment Division of Henrico County, Virginia (collectively "Appellees"). The district court held that Virginia's Freedom of Information Act, Va. Code

Ann. § 2.2-3700 et seq. (2011), ("VFOIA") does not violate the Appellants' rights under the Privileges and Immunities Clause (U.S. Const. art. IV, § 2, cl. 1) or Hurlbert's rights under the dormant commerce clause of the United States Constitution. For the reasons set forth below, we affirm the judgment of the district court.

## I.

This case is before us for the second time. Our prior decision concerned certain preliminary jurisdictional matters regarding parties and claims not at issue in the present appeal. Of relevance in that proceeding was our determination that the Appellants had standing to sue the Appellees. *McBurney v. Cuccinelli*, 616 F.3d 393 (4th Cir. 2010). We remanded the case for the district court to consider the Appellants' claims on the merits. *Id.* at 404.

We begin by briefly setting out the statutory framework of the VFOIA because it is central to the proceedings in this case. In enacting the VFOIA, the Virginia General Assembly stated its purpose to:

ensure[ ] the people of the Commonwealth ready access to public records in the custody of a public body or its officers and employees, and free entry to meetings of public bodies wherein the business of the people is being conducted. The affairs of government are not intended to be conducted in an atmosphere of secrecy since at all times the public is to be the beneficiary of any action taken at any level of government. Unless a public body or its officers or employees specifically elect to exercise an exemption provided by this chapter or any other statute, every meeting shall be open to the public and all public records shall be available for inspection and copying upon request. All public records and meetings shall be pre-

sumed open, unless an exemption is properly invoked.

Va. Code Ann. § 2.2-3700(B), para. 1. The statute provides, in relevant part:

Except as otherwise specifically provided by law, all public records shall be open to inspection and copying by any citizens of the Commonwealth during the regular office hours of the custodian of such records. Access to such records shall not be denied to citizens of the Commonwealth, representatives of newspapers and magazines with circulation in the Commonwealth, and representatives of radio and television stations broadcasting in or into the Commonwealth.

. . .

Va. Code Ann. § 2.2-3704(A).

McBurney is a citizen of Rhode Island. He has ties to his former residence of Virginia through divorce, child custody, and child support decrees adjudicated in the Commonwealth.

When McBurney's former wife defaulted on child support obligations, he asked the Virginia Division of Child Support Enforcement ("DCSE") to file a petition for child support on his behalf. Although the petition was eventually filed and granted, there was a nine-month delay in his ability to collect child support payments. McBurney then filed a VFOIA request with the DCSE seeking, *inter alia*, "all emails, notes, files, memos, reports, policies, [and] opinions" pertaining to him, his son, and his ex-wife, as well as "all documents regarding his application for child support" and the handling of child support claims where one spouse resides in a foreign country. McBurney asserts the DCSE possessed docu-



ments that would assist him in determining how his petition was processed and why the delay occurred.

The DCSE denied McBurney's VFOIA request on the grounds that the information was confidential and protected under Va. Code Ann. §§63.2-102 and -103, and because McBurney was not a citizen of the Commonwealth of Virginia. A second substantively identical request was also denied by DCSE solely on the grounds that McBurney was not a citizen of the Commonwealth. While McBurney later sought and acquired most of the requested information under Virginia's Government Data Collection and Dissemination Practices Act, Va. Code Ann. §§ 2.2-3800 et seq., he did not receive all of the information he had requested in his earlier VFOIA requests.

Hurlbert is a citizen of California and the sole proprietor of Sage Information Services. Hurlbert is in the business of requesting real estate tax assessment records for his clients from state agencies across the United States, including Virginia. Hurlbert filed a VFOIA request for assessment records for certain real estate parcels in Henrico County, Virginia with the Henrico County Real Estate Assessor's Office. Hurlbert's request was denied on the ground that he is not a citizen of the Commonwealth.

The Appellants subsequently filed an amended verified complaint in the District Court for the Eastern District of Virginia seeking declaratory and injunctive relief under 42 U.S.C. § 1983. In their complaint they pled that the "citizens-only provision [of VFOIA] impermissibly discriminates against [them] by denying them access to public records solely because [they] are not Virginia citizens." (J.A. 8A.) Relying on the Privileges and Immunities Clause, the Appellants asserted that VFOIA impermissibly denies them the "right to participate in Virginia's governmental and political processes" by barring

them "from obtaining information from Virginia's government." (J.A. 15A-16A.)

Hurlbert also raised a separate claim alleging that VFOIA's citizens-only provision "violates the dormant Commerce Clause because it grants Virginia citizens an exclusive right of access to Virginia's public records" and thus "bar[s] [him] from pursuing any business stemming from Virginia public records on substantially equal terms with Virginia citizens." (J.A. 18A.)

As noted earlier, after deciding the preliminary matters concerning jurisdiction and justiciability, we remanded the case to the district court for consideration on the merits. Upon remand, the parties filed cross motions for summary judgment. The district court granted summary judgment to the Appellees, holding that VFOIA's citizens-only provision did not violate the Appellants' rights under the Privileges and Immunities Clause or Hurlbert's rights under the dormant Commerce Clause. *McBurney v. Cuccinelli*, 780 F. Supp. 2d 439 (E.D. Va. 2011).

First, the district court held that the Appellants failed to show that VFOIA's citizens-only provision burdened a fundamental right protected by the Privileges and Immunities Clause. The court rejected two of the asserted rights, which it identified as access to government information and advocacy for one's own economic interests, as concepts that did not fall within the scope of the Privileges and Immunities Clause. *Id.* at 447-51.

Separately, the district court determined that Hurlbert was "engage[d] in a common calling within the meaning of the Privileges and Immunities Clause." *Id.* at 447. However, the district court found that the VFOIA did not infringe Hurlbert's right to pursue a common calling: "VFOIA's distinction between citizens and noncitizens is not a regulation of business and does not constitute discrimination pertaining to a common calling.



The statute's effect on Hurlbert's ability to practice his common calling is merely incidental." *Id.*

The district court also noted that VFOIA did not infringe McBurney's ability to access Virginia's courts because "if McBurney were to file a lawsuit in Virginia, he would be treated the same as a citizen litigant." *Id.* at 449. Distinguishing the fundamental right of access to courts under the Privileges and Immunities Clause from the sort of claim McBurney asserted, the district court noted that access to "documents to help decide whether he should file a lawsuit," was something "the Constitution does not require that noncitizens be given." *Id.*

Because the district court concluded VFOIA did not violate the Appellants' fundamental rights under the Privileges and Immunities Clause, it did "not reach the issues of whether Virginia has a substantial reason for discriminating against noncitizens with respect to requesting public records or whether the discrimination bears a substantial relationship to the state's objectives," both of which would also have been necessary for the Appellants' claims to succeed. *Id.* at 451.

The district court then turned to Hurlbert's contention that VFOIA violates the dormant commerce clause because it negatively impacts his ability to pursue his business in Virginia on substantially equal terms as Virginia citizens. Because the "VFOIA does not implicate principles of economic protectionism" and its "purpose is not to protect in-state business, but, instead, . . . to hold government officials accountable and prevent secrecy in government," the court rejected this argument. *Id.* at 453. The district court concluded that while the VFOIA "may have some incidental impact on out-of-state business, the goal is not to favor Virginia business over non-Virginia business" and thus the statute did not violate the dormant Commerce Clause. *Id.*

Having found no infringement of either the Appellants' rights under the Privileges and Immunities Clause or Hurlbert's rights under the dormant Commerce Clause, the district court granted the Appellees' motion for summary judgment.

The Appellants noted a timely appeal and we have jurisdiction under 28 U.S.C. § 1291.

## II.

Raising the same arguments they did in the district court, the Appellants appeal the district court's rejection of their claim that the VFOIA's citizens-only provision violates the Privileges and Immunities Clause.<sup>1</sup> In addition, Hurlbert challenges the district court's determination that the provision does not violate the dormant Commerce Clause.

We review the constitutionality of a statute *de novo*, *McLaughlin v. N.C. Bd. of Elections*, 65 F.3d 1215, 1221

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<sup>1</sup> Appellants do not contend that they fall under the media provision or otherwise make any argument related to that portion of the VFOIA. Instead, they direct their contentions to the VFOIA's general policy of providing records solely to "citizens of the Commonwealth." Cf. Va. Code Ann. § 2.2-3704(A).

Amici supporting the Appellants on appeal constitute a number of media organizations and First Amendment public interest organizations. While they join the Appellants in arguing that the citizens-only limitation violates the Privileges and Immunities Clause, some of them also appear to represent different interests than the Appellants given that they may fall under the media exception to the VFOIA. Because the contours of the media exception are not at issue with regard to the Appellants, we need not consider it, nor do we consider whether Amici could raise distinct arguments as to the applicability of the citizens-only provision of the VFOIA to their own situations. This opinion considers only the arguments the Appellants raise regarding the constitutionality of the VFOIA.

(4th Cir. 1995), and now consider the two constitutional arguments raised by the Appellants in turn.

#### A. The Privileges and Immunities Clause

The Privileges and Immunities Clause of Article IV of the United States Constitution provides: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."<sup>2</sup> U.S. Const. art. IV, § 2, cl. 1. "The object of the Privileges and Immunities Clause is to 'strongly . . . constitute the citizens of the United States [as] one people,' by 'plac[ing] the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned.'" *Lunding v. N.Y. Tax Appeals Tribunal*, 522 U.S. 287, 296 (1998) (citing *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1868)). The Clause thus "provides important protections for nonresidents who enter a State," and while "[t]hose protections are not 'absolute,' . . . the Clause 'does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States.'" *Saenz v. Roe*, 526 U.S. 489, 502 (1999) (citations omitted).

The Supreme Court has articulated a two-step inquiry to determine whether "claims that a citizenship or residency classification offends privileges and immunities protections." *Supreme Court of Va. v. Friedman*, 487 U.S. 59, 64 (1988).

First, the activity in question must be sufficiently basic to the livelihood of the Nation . . . as to fall within the purview of the Privileges

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<sup>2</sup> In the Privileges and Immunities Clause context, "citizen" and "resident" are interchangeable terms. *Supreme Court of N.H. v. Piper*, 470 U.S. 274, 279 n.6 (1985).

and Immunities Clause . . . . Second, if the challenged restriction deprives nonresidents of a protected privilege, [the court] will invalidate it only if [it] conclude[s] that the restriction is not closely related to the advancement of a substantial state interest.

*Id.* at 64-65 (internal citations and quotation marks omitted).

Although the Privileges and Immunities Clause "establishes a norm of comity," it does not "specify[ ] the particular subjects as to which citizens of one State coming within the jurisdiction of another are guaranteed equality of treatment." *Austin v. New Hampshire*, 420 U.S. 656, 660 (1975). It has been left to the Supreme Court and lower courts to define the scope of the Privileges and Immunities Clause, as "its contours . . . are not well developed." *Baldwin v. Fish & Game Comm'n of Mont.*, 436 U.S. 371, 379-80 (1978).

Significantly, the "fundamental rights" protected under the Privileges and Immunities Clause are not identical to the "fundamental rights" protected by other constitutional provisions and cover a much narrower range of activity. The Privileges and Immunities Clause is geared toward

secur[ing] to citizens of each State in the [United] States . . . those privileges and immunities which are common to the citizens in the latter States under their constitution and laws by virtue of their being citizens. Special privileges enjoyed by citizens in their own States are not secured in other States by this provision.

*Paul*, 75 U.S. (8 Wall.) at 180. As a result, the Supreme Court's jurisprudence has recognized that states are permitted to distinguish between residents and nonresi-

dents so long as those distinctions do not "hinder the formation, the purpose, or the development of a single Union of those States. *Only with respect to those 'privileges' and 'immunities' bearing upon the vitality of the Nation as a single entity must the State treat all citizens, resident and nonresident, equally.*" *Baldwin*, 436 U.S. at 383 (emphasis added). Toward that end, the Supreme Court has "held that certain rights are fundamental [under the Privileges and Immunities Clause], including the rights to: (1) practice a trade or profession; (2) access courts; (3) transfer property; and (4) obtain medical services." *McBurney*, 780 F. Supp. 2d at 447 (internal citations omitted).

In arguing for reversal of the grant of summary judgment to the Appellees, the Appellants contend the VFOIA infringes on rights they identify as "equal access to information," "equal access to courts,"<sup>3</sup> and the "ability to pursue their economic interests on equal footing." Separately, Hurlbert argues the VFOIA impermissibly burdens his right to pursue a common calling. *McBurney* also posits that the VFOIA infringes his "ability to advocate for his [political] interests and the interests of others similarly situated." (Opening Br. 26.) Only two of these asserted rights — the right to access courts and the right to pursue a common calling — are among the limited "fundamental rights" the Supreme Court has previously identified as protected by the Privileges and Immunities Clause.

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<sup>3</sup> Although Appellants jointly raise this argument in the opening brief, it appears that *McBurney* was the only one to advance this claim in the district court.



## 1. The Right to Pursue a Common Calling

Hurlbert contends the VFOIA unduly burdens his right to pursue a common calling because it prevents him from practicing his trade, which he defines as obtaining records related to real property on behalf of his clients, in Virginia. Even though the VFOIA does not regulate professions, Hurlbert asserts the statute nonetheless burdens his right to pursue a common calling because it prevents him from using his primary means of acquiring government records, that is, by personally filing a freedom of information act request. He further asserts the district court erred in concluding VFOIA did not impermissibly infringe on his claimed fundamental right because any effect was "merely incidental." This is so, Hurlbert contends, because upon showing any burden to a fundamental right protected by the Privileges and Immunities Clause, the analysis shifts to whether the state can justify its action.

The ability to pursue one's profession or "common calling" is one of the limited number of foundational rights protected under the Privileges and Immunities Clause. *Toomer v. Witsell*, 334 U.S. 385, 396 (1948); see also *United Bldg. & Constr. Trades Council v. Camden*, 465 U.S. 208, 219 (1984) ("Certainly, the pursuit of a common calling is one of the most fundamental of those privileges protected by the Clause."). Indeed, "[m]any, if not most, of [the Supreme Court's] cases expounding the Privileges and Immunities Clause have dealt with this basic and essential activity." *Camden*, 465 U.S. at 219. The Supreme Court has found the following provisions to impermissibly burden an individual's right to pursue a common calling — requiring nonresidents to pay substantially more for annual licenses to trade in goods (*Ward v. Maryland*, 79 U.S. (12 Wall.) 418 (1870)); requiring nonresidents to pay substantially more to engage in a particular profession (*Toomer*, 334 U.S. 385); requir-



ing nonresident commercial fisherman to pay ten times more for commercial fishing licenses (*Mullaney v. Anderson*, 342 U.S. 415 (1952)); resident-based hiring preferences for employment in the field of oil and gas development (*Hicklin v. Orbeck*, 437 U.S. 518 (1978)); limiting admission to the practice of law to residents (*Piper*, 470 U.S. 274); local rule limiting admission to the practice of law within a federal district court bar to individuals who lived in or maintained an office in the state, even if nonresidents could be admitted *pro hac vice* (*Frazier v. Heebe*, 482 U.S. 641 (1987)); and limiting admission by motion to the practice of law to residents, even if nonresidents could be admitted by examination (*Friedman*, 487 U.S. 59). Similarly, in *Tangier Sound Waterman's Ass'n v. Pruitt*, 4 F.3d 264 (4th Cir. 1993), we held that a Virginia statute "tri-pling the nonresident commercial fisherman's harvester's license fee" "effects a restriction" on the "right to earn a living." *Id.* at 265, 266. And in *O'Reilly v. Board of Appeals*, 942 F.2d 281 (4th Cir. 1991), we held that the county's use of residency as a determining factor in awarding Passenger Vehicle Licenses, which were required for individuals to operate taxi services within the county, burdened nonresidents' rights under the Privileges and Immunities Clause. *Id.* at 282, 284.

In each instance cited above, the provision at issue directly prohibited, restricted, or otherwise regulated the ability of a nonresident to engage in a certain profession or trade within the state. Each such regulatory enactment was specifically directed at a commercial activity and differentiated between residents and nonresidents solely as to the conduct of that commercial activity. This fact fundamentally distinguishes the typical provision that implicates the Privileges and Immunities Clause in the context of a common calling from the statute at issue here.

The VFOIA does not regulate anyone's qualifications or prerequisites to enter into or engage in any profession or trade within Virginia. It does not act as a wholesale barrier to entering a business, nor does it establish a license, fee, or other burden to nonresidents entering or engaging in a profession. On its face, it is clear the VFOIA addresses no business, profession, or trade. Simply put, there is something inherently and qualitatively different about the VFOIA as compared to any of the provisions considered by the Supreme Court in the context of the Privileges and Immunities Clause's right to pursue a common calling.

Indeed, no Supreme Court case or precedent within this Circuit has ever held that a statute whose purpose and language is unrelated to engaging in a particular profession, trade, or livelihood implicates the right to pursue one's common calling for purposes of the Privileges and Immunities Clause. Hurlbert nonetheless contends that because he is unable to file VFOIA requests on behalf of his clients while Virginia residents could do so for their clients, the VFOIA's citizens-only provision implicates nonresidents' (and specifically his own) right to pursue a common calling. At bottom, Hurlbert argues that even if the multiple thousands of VFOIA requests annually are unrelated to a common calling, the single instance of a tangential effect on him is sufficient to invalidate the VFOIA's citizens-only provision. We disagree.

While it may be true that VFOIA coincidentally limits a method by which Hurlbert conducts some of his business, it does not follow that the VFOIA impermissibly burdens his ability to pursue his common calling within the Commonwealth in a Privileges and Immunities Clause context. As the district court found, "[t]he statute's effect on Hurlbert's ability to practice his com-

mon calling is merely incidental." 780 F. Supp. 2d at 447. We agree.

Nothing in the language of the VFOIA prohibits Hurlbert from pursuing his profession in Virginia, or regulates his ability as a noncitizen to enter or engage in business there. Any effect on Hurlbert by the VFOIA is by happenstance; a circumstance never recognized by the Supreme Court in its Privileges and Immunities Clause case law. While the Supreme Court's jurisprudence recognizes that burdens short of a "wholesale restriction[ ]" fall within the right to pursue a common calling, no case has ever struck down a statute or regulation with such an indirect and tangential relationship to the practice of a trade or profession. See *Friedman v. Supreme Court of Va.*, 822 F.2d 423, 427 (4th Cir. 1987), *aff'd by Friedman*, 487 U.S. 59. Unlike the provision in *Friedman*, which restricted the method by which a noncitizen attorney could enter into the practice of law in the state, the VFOIA simply does not regulate Hurlbert's ability to enter into or pursue his trade or profession in Virginia. At most, the VFOIA limits one method by which Hurlbert may carry out his business and thus has an "incidental effect" on his common calling in Virginia. But the ease or method of carrying out one's work within a state is several steps removed from the right to work within the state on "terms of substantial equality" as residents in the first instance. See *Toomer*, 334 U.S. at 396. As such, we conclude the VFOIA does not implicate Hurlbert's right to pursue a common calling under the Privileges and Immunities Clause and the district court did not err in so holding.

## 2. Other Claimed Privileges and Immunities Clause Rights

To support their contention that VFOIA infringes a protected right they enunciate as "equal access to infor-

mation," the Appellants rely on the Third Circuit's decision in *Lee v. Minner*, 458 F.3d 194 (3d Cir. 2006). There, the Third Circuit held that Delaware's Freedom of Information Act violated the Privileges and Immunities Clause by limiting access to public records to Delaware citizens. *Id.* at 195. The court concluded that "[e]ffective advocacy and participation in the political process" requires "access to public records" and thus is an "essential activity" which 'bear[s] upon the vitality of the Nation as a single entity.'" *Id.* at 200. The Appellants assert that VFOIA similarly burdens their ability to obtain public records and "advocate for their interests on equal footing with Virginia citizens." (Opening Br. 23.)

Appellants' reliance on *Lee* is misplaced for at least two reasons. First, as out-of-circuit authority, it is not binding on this Court. Although the Third Circuit traced its analysis to general principles from Privileges and Immunities Clause jurisprudence, the specific right that *Lee* identified is not one previously recognized by the Supreme Court, or any other court, as an activity within the scope of the Privileges and Immunities Clause. Second, even were we to follow *Lee*'s rationale, that case is materially distinguishable from the situation presented by the Appellants. The right identified in *Lee* — "to engage in the political process with regard to matters of both national political and economic importance," *id.* at 199 — is not the same right the Appellants advance. By contrast, the Appellants want access to information of *personal* import rather than information to advance the interests of other citizens or the nation as a whole, or that is of political or economic importance. Thus, the "right" the Third Circuit identified in *Lee*, and the basis for concluding it implicates the Privileges and Immunities Clause, does not apply to the case at bar. The Appellants assert a generalized right to access information that reaches far more broadly than even *Lee* set forth.



For these reasons, we find Appellants' argument that *Lee's* rationale applies here unpersuasive.

To the extent Appellants urge us to adopt the position that there is a "broad right of access to information" stemming from the policy of open government undergirding freedom of information acts generally and grounded in "the First Amendment's guarantees of free speech and free press," we are similarly not persuaded. (Cf. Opening Br. 25.) While the Appellants may well be correct that access to public records is of "increasing importance . . . in the information age," that assertion misses the salient inquiry. (See Opening Br. 26 (citation omitted).)

The Supreme Court's Privileges and Immunities Clause jurisprudence simply does not lead to the conclusion Appellants advance. As the Supreme Court in *Baldwin* observed:

It has not been suggested . . . that state citizenship or residency may never be used by a State to distinguish among persons. Suffrage, for example, always has been understood to be tied to an individual's identification with a particular State. No one would suggest that the Privileges and Immunities Clause requires a State to open its polls to a person who declines to assert that the State is the only one where he claims a right to vote. The same is true as to qualification for an elective office of the State. Nor must a State always apply all its laws or all its services equally to anyone, resident or nonresident, who may request it to do so. Some distinctions between residents and nonresidents merely reflect the fact that this is a Nation composed of individual States, and are permitted; other distinctions are prohibited because they hinder the formation, the

purpose, or the development of a single Union of those States. Only with respect to those "privileges" and "immunities" bearing upon the vitality of the Nation as a single entity must the State treat all citizens, resident and non-resident, equally.

436 U.S. at 383 (internal citations omitted). Access to a state's records simply does not "bear[ ] upon the vitality of the Nation as a single entity" such that VFOIA's citizen-only provision implicates the Privileges and Immunities Clause. *Cf. id.*

A sidebar to this argument is McBurney's assertion that the VFOIA burdens his "ability to advocate for his interests and the interests of others similarly situated." (Opening Br. 26.) McBurney claims on brief that the district court read his VFOIA request too narrowly and that because he sought documents regarding DCSE processing of child support cases generally, and not just as related to his own case, he was not permitted to "take part in an interstate dialogue regarding state child support practices that directly affect his life and income, as well as the life and income of others." (Opening Br. 27.)

However, McBurney's complaint belies his assertion on appeal that he was attempting to advance an interest beyond his personal one. In the complaint, McBurney only asserted a Privileges and Immunities Clause claim on his own behalf, noting that without the information he sought, he cannot "participate in Virginia's governmental and political processes," "cannot advocate effectively on his own behalf, cannot invoke any of Virginia's dispute resolution procedures for dispute resolution, and cannot resolve the issues surrounding his child support application." (J.A. 15A-17A.) McBurney did not purport to be acting on behalf of others similarly situated, and only contended that the VFOIA limited his ability to advance *his own* interests. McBurney never argued before the



district court that he sought to advance the interests of those "similarly situated."

McBurney's argument rests then on the assertion of a right "to advocate for his interests," a right that has not directly been recognized under the Privileges and Immunities Clause. To the extent McBurney's argument encompasses a general right of access to public records, that argument fails for the reasons set forth previously. To the extent it overlaps with a right to access to courts, that argument fails for the reasons set forth below. In addition, and contrary to McBurney's contention, the VFOIA's citizen's-only provision does not bar him from engaging in the political process, advocating his own interests, or advancing his political or legal arguments within the Commonwealth. For all of these reasons, we also reject McBurney's argument that VFOIA impermissibly restricts his ability to advocate his own and others' interests.

Appellants next contend that VFOIA implicates their "right of equal access to courts" because "VFOIA denies noncitizens access to public records needed to prepare and file meaningful legal papers in suits against Virginia public officials." (Opening Br. 28.) However, what the Appellants invoke is something much different than any court access right previously recognized under the Privileges and Immunities Clause.

The Supreme Court has long held that the Privileges and Immunities Clause protects the right of a citizen of one state to access the courts of another state. *Canadian N. Railway Co. v. Eggen*, 252 U.S. 553, 560 (1920) (recognizing the "right of a citizen of one state . . . to institute and maintain actions of any kind in the courts of another") (internal quotation marks and citation omitted). Nothing in VFOIA directly or indirectly speaks to the Appellants' ability to file a proceeding in any court or otherwise enforce a legal right within Virginia. Access to

courts has never been interpreted to mean that states must provide individuals with access to public records that may or may not lead to discovery of a potential legal claim. We decline to do so here. The Privileges and Immunities Clause is not a mechanism for pre-lawsuit discovery, and access to public records as part of the preparation for possible litigation is not "sufficiently basic to the livelihood of the Nation" so as to fall within the protection of the Privileges and Immunities Clause. *Cf. Friedman*, 487 U.S. at 65.

Citing *Pruitt*, the Appellants also assert that VFOIA infringes on their "ability to pursue their economic interests on equal footing with Virginia residents." (Opening Br. 29.) But *Pruitt* is a common calling case and does not set forth some novel generic right to pursue "economic interests" under the Privileges and Immunities Clause. 4 F.3d at 266. Appellants' arguments related to a right to pursue economic interests largely mirror the arguments they make with regard to other rights — for McBurney, the ability to access courts on equal footing as Virginia citizens, and for Hurlbert, the right to pursue a common calling. We find no support in the relevant case law to identify a new right to pursue economic interests within the ambit of the Privileges and Immunities Clause. Accordingly, this argument also fails.

For the foregoing reasons, we conclude the district court did not err in concluding that the VFOIA does not infringe on any of the Appellants' fundamental rights or privileges protected by the Privileges and Immunities Clause. Accordingly, we need not address the parties' arguments regarding the rest of the Supreme Court's test for whether a provision violates the Clause. Having failed to satisfy the first part of that test, Appellants' claim that the VFOIA violates the Privileges and Immunities Clause cannot succeed as a matter of law.

## B. Dormant Commerce Clause

Hurlbert lastly contends the district court erred in concluding the citizens-only provision of VFOIA does not violate the dormant Commerce Clause. Dormant Commerce Clause jurisprudence arises as a "negative implication" of the Constitution's Commerce Clause, U.S. Const. art. I, § 8, cl. 3, which empowers Congress "[t]o regulate Commerce . . . among the several States." See *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 337 (2008) (quoting U.S. Const. art. I, § 8, cl. 3). The dormant Commerce Clause restrains "the several States" by limiting "the power of the States to erect barriers against interstate trade." *Dennis v. Higgins*, 498 U.S. 439, 446 (1991) (internal quotation marks omitted). And it "is driven by concern about economic protectionism—that is, regulatory measures *designed* to benefit in-state economic interests by burdening out-of-state competitors." *Davis*, 553 U.S. at 337-38 (internal quotation marks omitted) (emphasis added).

There are two "tiers" in analyzing dormant Commerce Clause claims, depending on the type of burden at issue. The first tier applies "where a state law discriminates facially, in its practical effect, or in its purpose" against interstate commerce. *Env'tl Tech. Council v. Sierra Club*, 98 F.3d 774, 785 (4th Cir. 1996). Under such first tier review, "'discrimination' simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007). The principle is grounded in the belief that "[t]he mere fact of nonresidence should not foreclose a producer in one State from access to markets in other States" and it prohibits states from "enact[ing] laws that burden out-of-state producers or shippers simply to give a competitive advantage to in-state businesses." *Granholm v. Heald*, 544 U.S. 460, 472

(2005). "Unless discrimination is demonstrably justified by a factor unrelated to economic protectionism, a 'discriminatory law is virtually *per se* invalid.'" *Brown v. Hovatter*, 561 F.3d 357, 363 (4th Cir. 2009) (quoting *Davis*, 553 U.S. at 338).

The second tier of dormant Commerce Clause analysis is commonly called the *Pike* test. See *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). Used in the absence of "discrimination for the forbidden purpose," the *Pike* analysis requires courts to consider "whether the state law[ ] unjustifiably . . . burden[s] the interstate flow of articles of commerce." *Brown*, 561 F.3d at 363 (quotation marks and citation omitted). In second tier analysis, the regulatory measure at issue is not scrutinized as strictly as under the first method and "will be upheld unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *Id.* at 363 (quoting *Pike*, 397 U.S. at 142).

Hurlbert asserts that the district court erred in applying the second tier analysis instead of first tier analysis, and that under the first tier analysis, VFOIA violates the dormant Commerce Clause. Hurlbert contends VFOIA is *per se* unconstitutional under first tier analysis because it facially discriminates by "expressly guarantee[ing] access to public records only to Virginia citizens and authoriz[ing] the state to bar noncitizens." (Opening Br. 38.) At the very least, he asserts, VFOIA discriminates in effect because it "den[ies] access to records to noncitizens who seek to use public records for commercial purposes while allowing unfettered access to in-state requestors with similar economic interests." (Opening Br. 38-39.)

Hurlbert's argument fails because it is not enough that a statute discriminates on the basis of citizenship for it to offend dormant Commerce Clause principles. Rather, the challenged statute must discriminate "against



interstate commerce" or "out-of-state economic interests." Cf. *United Haulers Ass'n*, 550 U.S. at 338.<sup>4</sup> Although the VFOIA discriminates against noncitizens of Virginia, it does not discriminate "against inter-state commerce" or "out-of-state economic interests." The object of the VFOIA is to provide a mechanism for access and copying of public records to Virginia citizens to reflect that "[t]he affairs of government are not . . . conducted in an atmosphere of secrecy . . . ." Va. Code Ann. § 2.2-3700(B), para. 1. The VFOIA is wholly silent as to commerce or economic interests, both in and out of Virginia. Therefore, the VFOIA does not facially, or in its effect, discriminate against interstate commerce or out-of-state economic interests.

Any effect on commerce is incidental and unrelated to the actual language of VFOIA or its citizens-only provision. As we have previously observed:

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<sup>4</sup> As we have previously noted, "[t]he clearest example of a state law that violates the Dormant Commerce Clause is one that *facially discriminates against interstate commerce, such as a protective tariff or customs duty*. Even a facially neutral state law, however, violates the Dormant Commerce Clause 'when its effect is to favor *instate economic interests over out-of-state interests*.'" *DIRECTV, Inc. v. Tolson*, 513 F.3d 119, 122 (4th Cir. 2008) (emphases added); see also *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.*, 520 U.S. 564, 575-76 (1997) ("It is not necessary to look beyond the text of this statute to determine that it discriminates against interstate commerce. The Maine law expressly distinguishes between entities that serve a principally interstate clientele and those that primarily serve an intrastate market, singling out camps that serve mostly in-staters for beneficial tax treatment, and penalizing those camps that do a principally interstate business. As a practical matter, the statute encourages affected entities to limit their out-of-state clientele, and penalizes the principally nonresident customers of businesses catering to a primarily interstate market.").

The dormant Commerce Clause is implicated by burdens placed *on the flow of interstate commerce*—the flow of goods, materials, and other articles of commerce across state lines. And it is a trade barrier to the free flow of goods, materials, and other articles of commerce across state lines that violates the dormant Commerce Clause. *The Clause does not purport to . . . protect the participants in intrastate or interstate markets, nor the participants' chosen way of doing business.*

*Brown*, 561 F.3d at 364 (internal citations omitted) (second emphasis added). Nothing in VFOIA burdens "the flow of interstate commerce." At most, it prevents Hurlbert from using his "chosen way of doing business," but it does not prevent him from engaging in business in the Commonwealth. The VFOIA simply does not fall within the type of provision to which the first tier test of analyzing dormant Commerce Clause claims applies. Hurlbert's argument that the district court erred in applying the second tier, rather than first tier, analysis thus fails.

Significantly, Hurlbert's opening brief does not challenge the district court's application of the second tier analysis. It only contends that the "district court erred by not applying rigorous scrutiny to VFOIA's citizens-only provision and instead applying the *Pike* balancing analysis reserved for evenhanded statutes." (Opening Br. 40.) Having rejected the challenge Hurlbert makes to the district court's analysis, we need not go beyond it to consider how the court undertook the *Pike* analysis because Hurlbert has waived any challenge to that component of the district court's analysis by not raising it in his opening brief. See Fed. R. App. P. 28(a)(9)(A) (stating that an appellant's opening brief must contain the "appellant's contentions and the reasons for them"); *IGEN Int'l, Inc. v. Roche Diagnostics GMBH*, 335 F.3d 303, 308 (4th Cir.



2003). The district court therefore did not err in rejecting Hurlbert's dormant Commerce Clause claim.

III.

For the reasons set forth above, we affirm the district court's judgment.

*AFFIRMED*

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF VIRGINIA  
RICHMOND DIVISION

MARK J. McBURNEY, *et al.*,

Plaintiffs,

v.

KENNETH T. CUCCI-  
NELLI II, *et al.*,

Defendants.

Action No. 3:09-CV-44

**MEMORANDUM OPINION**

THIS MATTER is before the Court on Plaintiffs' Cross Motion for Summary Judgment (Doc. No. 56); the State Defendant's Motion for Summary Judgment (Doc. No. 54); and Defendant Thomas C. Little's Cross-Motion for Summary Judgment (Doc. No. 52). For the reasons stated below, the Court GRANTS Defendant Thomas C. Little's Cross-Motion for Summary Judgment and the State Defendant's Motion for Summary Judgment and DENIES Plaintiffs' Cross Motion for Summary Judgment.

**I. BACKGROUND**

Plaintiffs Mark J. McBurney ("McBurney") and Roger W. Hurlbert ("Hurlbert") allege different facts that support their common argument that Virginia's Freedom of Information Act ("VFOIA") violates the dormant Commerce Clause and the Privileges and Immunities

Clause of Article IV ("Privileges and Immunities Clause") of the United States Constitution.

a. McBurney's Claims

McBurney was a Virginia citizen from 1987 until 2000. He married Lore Ethel Mills ("Mills") while living in Virginia. The couple had a son, but divorced in 2002. A court awarded Mills custody and ordered McBurney to pay child support. McBurney and Mills subsequently entered into a private agreement whereby their son would live with McBurney in Australia and Mills would pay child support. Mills eventually defaulted on the agreement and McBurney, still in Australia, filed a child support application with the Virginia Department of Social Services' Division of Child Support Enforcement ("DCSE") in July 2006. DCSE failed to file a proper petition and McBurney was denied child support payments for nine months.

McBurney moved back to the United States, to Rhode Island, and made a VFOIA request in April 2008 for all documents pertaining to him, his son, and his ex-wife. DCSE denied his request on grounds that portions of the information requested were confidential under Virginia law and he could not receive the non-confidential information because he was not a Virginia citizen. McBurney filed a second VFOIA request in May 2008 that listed a Virginia address, but DCSE also denied this request because McBurney was not a Virginia citizen. DCSE did, however, inform McBurney that he could obtain the requested information under Virginia's Government Data Collection and Dissemination Practices Act. McBurney submitted a request under this Act and obtained some, but not all, of the documents he could have received under VFOIA.

b. Hurlbert's Claims

Hurlbert is a California citizen and the sole proprietor of Sage Information Services, a California company. Hurlbert is in the business of obtaining real estate tax records from state agencies throughout the United States, including in Virginia. He requests records pursuant to states' freedom of information statutes. Hurlbert charges \$75 per hour for his services, which include procuring records and using negotiation or litigation to obtain records if necessary.

Hurlbert filed a VFOIA request for real estate property assessment records with Henrico County's Real Estate Assessment Division in June 2008. The County denied the request because Hurlbert was not a Virginia citizen. Hurlbert subsequently received the requested information in February 2009, when the County sent the records to his attorney in Virginia. Hurlbert has not attempted to request records from Virginia since June 2008. Prior to having his request denied, Hurlbert made seventeen requests for records from Virginia, fifteen of which were in early 2008.

c. Procedural Posture

McBurney and Hurlbert commenced an action on January 21, 2009, against the Attorney General for the Commonwealth of Virginia, then Robert F. McDonnell;<sup>5</sup> Nathaniel L. Young, Deputy Commissioner and Director

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<sup>5</sup> Plaintiffs initially named Attorney General Robert F. McDonnell, in his official capacity, as a Defendant. Kenneth T. Cuccinelli II is now the Attorney General and is substituted pursuant to the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 25(d) (stating that when a party who holds a public office ceases to hold that office while an action is pending, the officer's successor is automatically substituted as a party).

of Virginia's DCSE ("the State Defendant"); and Samuel A. Davis ("Davis"),<sup>6</sup> Director of the Real Estate Assessment Division in Henrico County, Virginia. Plaintiffs' action sought declaratory and injunctive relief from enforcement of VFOIA pursuant to 42 U.S.C. § 1983. The Court granted Plaintiffs leave to amend their Complaint to add Bonnie E. Stewart ("Stewart") as a plaintiff on April 7, 2009.

The Attorney General and State Defendant filed a Motion to Dismiss and Remove the Attorney General as an Improper Party. Davis also filed a Motion to Dismiss. This Court granted both Motions. *McBurney v. Mims*, No. 3:09-CV-44, 2009 WL 1209037, at \*6-7 (E.D. Va. May 1, 2009).<sup>7</sup> The Court held that the Attorney General was not a proper party under the Eleventh Amendment. *Id.* at \*3-4. Because Stewart only asserted claims against the Attorney General, she was dismissed as a Plaintiff when the Attorney General was dismissed as a Defendant. The Court also held that McBurney and Hurlbert lacked standing to bring claims against the State Defendant and Davis and dismissed them as Plaintiffs. *Id.* at \*6-7. Because only McBurney brought a claim against the State Defendant and only Hurlbert brought a claim against Davis, the Court dismissed Davis and the State Defendant as Defendants. Consequently, no parties remained before the Court and it dismissed the case.

Plaintiffs appealed the dismissal. The Fourth Circuit affirmed in part, reversed in part, and remanded the

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<sup>6</sup> Thomas C. Little ("Little") is now the Director of Henrico County's Real Estate Assessment Division and has been substituted pursuant to Rule 25(d) of the Federal Rules of Civil Procedure.

<sup>7</sup> William C. Mims was Attorney General when this Court ruled on the Motions to Dismiss and was substituted as a Defendant in the stead of Robert F. McDonnell.



case for further proceedings. *McBurney v. Cuccinelli*, 616 F.3d 393, 404-05 (4th Cir. 2010). The Fourth Circuit affirmed the holding that the Attorney General was not a proper party, but found that McBurney and Hurlbert had standing to bring their claims. *Id.* at 403-04. Accordingly, this Court was directed to consider McBurney's and Hurlbert's claims on the merits.

## II. LEGAL STANDARD

A motion for summary judgment should be granted where "there is no genuine issue as to any material fact" and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c)(2). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The moving party bears the burden of establishing the nonexistence of a triable issue of fact by "showing ... that there is an absence of evidence to support the non-moving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

A court may consider the parties' pleadings, discovery materials, and affidavits to determine if a triable issue exists. Fed. R. Civ. P. 56(c)(2). "Summary judgment is appropriate only where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Nat'l Ass'n of Gov't Emps. v. Fed. Labor Relations Auth.*, 830 F. Supp. 889, 897 (E.D. Va. 1993) (internal citation omitted). All "factual disputes and any competing, rational inferences [are resolved] in the light most favorable to the party opposing [the] motion." *Rosignol v. Voorhaar*, 316 F.3d 516, 523 (4th Cir. 2003) (internal citation omitted).

When considering cross-motions for summary judgment, the court must apply the same standard and can-

not resolve genuine issues of material fact. *Monumental Paving & Excavating, Inc. v. Pa. Mfrs' Ass'n Ins. Co.*, 176 F.3d 794, 797 (4th Cir. 1999). The court should "consider and rule upon each party's motion separately and determine whether summary judgment is appropriate as to each under the Rule 56 standard." *Id.*

### III. DISCUSSION

The Virginia Freedom of Information Act provides in relevant part:

Except as otherwise specifically provided by law, all public records shall be open to inspection and copying by any citizens of the Commonwealth during the regular office hours of the custodian of such records. Access to such records shall not be denied to citizens of the Commonwealth, representatives of newspapers and magazines with circulation in the Commonwealth, and representatives of radio and television stations broadcasting in or into the Commonwealth.

Va. Code Ann. § 2.2-3704(A).

Plaintiffs move the Court to grant their Motion and (1) declare VFOIA's citizens-only provision unconstitutional because it violates the Privileges and Immunities Clause and the dormant Commerce Clause; (2) enjoin Defendants from enforcing the citizens-only provision; and (3) order Defendants to process McBurney's pending VFOIA request. Plaintiffs assert that VFOIA violates their rights under the Privileges and Immunities Clause by impeding their access to public information, rendering them unable to advocate for their interests, denying them equal access to courts, and preventing them from pursuing economic interests on the same footing at Virginia citizens. Plaintiffs further assert that VFOIA's citizens-only clause violates the dormant Commerce Clause

because it erects barriers to interstate commerce, making it impossible for noncitizens to do business on an equal basis with Virginia citizens.

The parties have not shown a genuine dispute over any material fact. Accordingly, the Court decides only if any party is entitled to judgment as a matter of law.

a. Hurlbert Has Standing

To have standing, a plaintiff must show: (1) he suffered an injury, which means "an invasion of a legally protected interest which is (a) concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical;" (2) the injury was caused by the person sued; and (3) a court can likely redress the injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal citation and quotation marks omitted).

Little argues that Hurlbert does not have standing because he cannot prove an injury and this Court cannot redress any alleged injury. Little argues that any future injury is speculative because Hurlbert cannot identify lost business caused by VFOIA's citizens-only provision or when he might request Virginia records in the future.

Plaintiffs argue that Hurlbert has standing. They maintain that he has been injured because he cannot pursue any business that involves requesting public records from Virginia. He can show causation because he has missed out on business opportunities because he is a noncitizen who cannot request public records under VFOIA. Finally, Hurlbert's injury is redressable by this Court because if the Court finds the VFOIA provision unconstitutional, and thus unenforceable, Hurlbert will be able to accept Virginia business.

The Fourth Circuit held that Hurlbert's amended complaint "is best read to plead an ongoing injury" and that "the complaint stated sufficient facts to support

standing. . . ." *McBurney v. Cuccinelli*, 616 F.3d 393, 403-04 (4th Cir. 2010). Similarly, this Court finds that Hurlbert has standing. The amended complaint is sufficient to confer standing because it pleads injury in the form of lost revenue resulting from Hurlbert's inability to request and receive public records from Virginia. Hurlbert can show causation because he can show that he has lost or is unable to take Virginia business because of VFOIA's citizens-only clause. Finally, Hurlbert can show redressability. He states that if the statute is declared unconstitutional and he is allowed to make the requests, he will be able to provide records for his clients, whom he has reason to believe would need Virginia records. Thus, this Court can redress Hurlbert's injury and he has standing to bring this lawsuit.

b. VFOIA Does Not Burden a Fundamental Right Within the Meaning of the Privileges and Immunities Clause

The Privileges and Immunities Clause states "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const. art. IV, § 2, cl. 1. The purpose of the Clause is "to outlaw classifications based on the fact of non-citizenship unless there is something to indicate that non-citizens constitute a peculiar source of the evil at which the statute is aimed." *Toomer v. Witsell*, 334 U.S. 385, 398 (1948). In other words, the purpose is "to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy." *Id.* at 395. The Clause does not, however, "preclude discrimination against citizens of other States where there is a 'substantial reason' for the difference in treatment." *United Bldg. & Constr. Trades Council v. Camden*, 465 U.S. 208, 222 (1984). In determining whether a state has violated the Privileges and Immunities Clause, a court must consider whether (1) the state policy burdens a right protected by



the Privileges and Immunities Clause; (2) the state has a substantial reason for discriminating against noncitizens; and (3) the discrimination against noncitizens bears a substantial relationship to the state's objective. *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 284 (1985); *Camden*, 465 U.S. at 218; *Toomer*, 334 U.S. at 396.

The Privileges and Immunities Clause protects fundamental rights. See *Parnell v. Supreme Court of Appeals*, 110 F.3d 1077, 1080 (4th Cir. 1997). A right is fundamental if it is "sufficiently basic to the livelihood of the Nation." *Baldwin v. Fish & Game Comm'n of Mon.*, 436 U.S. 371, 388 (1978). The Supreme Court of the United States has held that certain rights are fundamental, including the rights to: (1) practice a trade or profession, *Toomer*, 334 U.S. at 403; (2) access courts, *Canadian N. Ry. Co. v. Eggen*, 252 U.S. 553, 562 (1920); (3) transfer property, *Blake v. McClung*, 172 U.S. 239, 251-52 (1898); and (4) obtain medical services, *Doe v. Bolton*, 410 U.S. 179, 200 (1973). States can, however, limit to its own residents certain privileges such as the rights to vote and hold elective office. *Piper*, 470 U.S. at 282 n. 13.

1. *VFOIA Does Not Interfere with Hurlbert's Right to Pursue His Common Calling*

Plaintiffs assert that VFOIA's citizens-only provision interferes with Hurlbert's right to pursue a common calling because it limits his ability to earn a living by operating a national records retrieval service. Because accessing information is an integral component of Hurlbert's trade, he alleges that the core of his business is adversely affected by the citizens-only provision and, consequently, he cannot practice his common calling in Virginia.

Little argues that Hurlbert's business is not a common calling. Hurlbert is in the business of requesting



public records on behalf of clients and acting as a plaintiff for those clients when records are withheld. Little argues that this means Hurlbert is essentially a records conduit and shell plaintiff, neither of which qualifies as a common calling. Should the Court determine that Hurlbert's business qualifies a common calling, Little asserts that VFOIA's distinguishing between citizens and noncitizens does not constitute discrimination regarding a common calling, as VFOIA's impact on business is indirect and incidental.

It is well-settled that the right to pursue a common calling is fundamental: "[T]he pursuit of a common calling is one of the most fundamental of those privileges protected by the [Privileges and Immunities] Clause." *United Bldg. & Constr. Trades Council v. Camden*, 465 U.S. 208, 219 (1984). The Court finds that Hurlbert does engage in a common calling within the meaning of the Privileges and Immunities Clause, but that VFOIA's citizens-only provision does not impermissibly violate the right to pursue that common calling. Hurlbert makes a living by requesting records on behalf of clients. It is undisputed that his clients pay him to request records from state governments and that his job includes removing barriers to records. This type of work constitutes a common calling. Denying Hurlbert access to public records does not, however, interfere with his common calling. VFOIA's distinction between citizens and noncitizens is not a regulation of business and does not constitute discrimination pertaining to a common calling. The statute's effect on Hurlbert's ability to practice his common calling is merely incidental. Accordingly, VFOIA's citizens-only provision does not impermissibly interfere with Hurlbert's fundamental right to pursue a common calling and does not violate the Privileges and Immunities Clause.

## 2. *The Right to Access Information is Not a Fundamental Right*

Plaintiffs assert that the right to access public documents is fundamental and that VFOIA burdens this right. Plaintiffs argue that the fact that all fifty states and the federal government have open government or sunshine laws indicates that the right to access public information is a fundamental right.

Plaintiffs compare the instant case to *Lee v. Minner*, 458 F.3d 194 (3d Cir. 2006), which held that access to public records for certain purposes is a right protected by the Privileges and Immunities Clause. The plaintiff in *Lee* was a New York citizen who challenged the citizens-only provision of Delaware's Freedom of Information Act after he was denied access to records pertaining to Delaware's joining a nationwide settlement with *Household International, Inc.* *Id.* at 195. The Third Circuit affirmed the district court's ruling that the citizens-only provision violated the Privileges and Immunities Clause because there was "no nexus between the State's purported objective and its practice of prohibiting noncitizens from obtaining public records." *Id.* at 201.

Defendants distinguish *Lee* by arguing that the plaintiff in *Lee* requested documents for the purpose of writing about "matters of both national political and economic importance." *Id.* at 196 (internal quotation marks omitted). Defendants maintain that Plaintiffs in the instant case are not engaging in matters of national political and economic importance, but, instead, are attempting to settle personal scores with the state. Defendants also argue that *Lee* was wrongly decided, as the Privileges and Immunities Clause was not enacted to protect the right to engage in the political process with regard to matters of national political and economic importance. Instead, Defendants believe the Clause was designed to ensure that noncitizens could buy and sell goods and services, prac-

tice a trade, and obtain legal redress on the same terms as citizens.

Little argues that the right to access information it is not fundamental within the meaning of the Privileges and Immunities Clause because it is not "sufficiently basic to the livelihood of the Nation . . . ." *Baldwin v. Fish & Game Comm'n of Mon.*, 436 U.S. 371, 388 (1978). Little argues that the relative youth of freedom of information statutes undermines the notion that they are so "basic to the livelihood of the Nation," *id.*, that they should trigger protection under the Privileges and Immunities Clause.

The State Defendant argues that the Privileges and Immunities Clause does not protect a sweeping right of access to information. The State Defendant also argues that the relatively recent enactment of VFOIA and the federal FOIA undermine the notion that they are so "basic to the livelihood of the Nation," that they should trigger the protections of the Privileges and Immunities Clause. *Baldwin*, 436 U.S. at 383. Further, the nation as a whole would not be undermined if states limited FOIA disclosures to residents. Finally, the State Defendant argues that McBurney has not actually been denied access to information on the basis of his citizenship, as there are many other ways to obtain the desired documents.

The Court agrees with Defendants that the right to access information is not fundamental within the meaning of the Privileges and Immunities Clause. The Clause protects "[t]hose privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign." *Corfield v. Coryell*, 6 F. Cas. 546, 551, F. Cas. No. 3230 (C.C.E.D.

Pa. 1823). Because freedom of information statutes did not come into existence until the middle of the twentieth century,<sup>8</sup> it is clear that the right to information has not "[a]t all times, been enjoyed by the citizens of the several states...." *Id.* Accordingly, it is unlikely that the drafters of the Constitution contemplated the right to access information, and the Court finds that such a right is not fundamental.

The Court distinguishes the instant case from the *Lee*, which held that Delaware's FOIA violated the Privileges and Immunities Clause because it restricted "noncitizens' rights to access, inspect, and copy public documents." *Lee v. Minner*, 458 F.3d 194, 195 (3d Cir. 2006). Plaintiffs in the instant case are not attempting to engage in the political process with respect to matters of national political and economic importance, which is the specific right at issue in *Lee*. Instead, Plaintiffs in the instant case seek to have declared fundamental a broad right to access information. Unlike the plaintiff in *Lee*, a journalist who sought information in an attempt to write about matters of national importance, Plaintiffs in the instant case seek information for their personal benefit or for the benefit of a limited group of clients. Thus, matters of national political and economic importance are not at stake and Plaintiffs are not attempting to engage in the political process. Accordingly, the right at issue in *Lee* is not implicated in the instant case.

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<sup>8</sup> Virginia adopted its Freedom of Information Act in 1968. 1968 Va. Acts c. 479. The federal government enacted its statute two years earlier, in 1966. Freedom of Information Act, Pub. L. No. 89-554, 80 Stat. 383.

### 3. *The Right to Access Courts is Not Implicated*

Plaintiffs believe VFOIA burdens their right of equal access to courts because the citizens-only provision limits noncitizens' ability to discover when and where a legal wrong occurred.

The State Defendant argues that McBurney has not been denied access to any court in Virginia, as he has not filed a lawsuit. The State Defendant further argues that VFOIA's citizens-only provision does not prevent McBurney from gaining meaningful access to courts because, if McBurney were to file a lawsuit in Virginia, he would be treated the same as a citizen litigant.

The right to access courts is protected under the Privileges and Immunities Clause. *Canadian N. Ry. Co. v. Eggen*, 252 U.S. 553, 562 (1920). The Court finds, however, that McBurney's right to access courts is not implicated in this case. To the extent McBurney might need documents to prove DCSE mishandled his child support application, they would be available to him during the discovery phase of that litigation. Consequently, a lawsuit initiated by McBurney would not be prejudiced by VFOIA's citizens-only provision. Furthermore, the Supreme Court has held that the Constitution simply requires that a noncitizen be "given access to the courts of the State upon terms which in themselves are reasonable and adequate for the enforcing of any rights" the noncitizen has, but the rights need not "be technically and precisely the same in extent as those accorded to resident citizens." *Id.* Thus, even if a citizen could obtain documents to help decide whether he should file a lawsuit, the Constitution does not require that noncitizens be given the exact same right.



4. *The Rights to Advocate for One's Own Interest and Pursue Economic Interests Are Not Fundamental Rights*

Plaintiffs argue that VFOIA burdens the rights to advocate for one's own interest and pursue economic interests, both of which Plaintiffs maintain are fundamental. Plaintiffs first argue that McBurney's ability to advocate for his interests is affected because VFOIA limits his ability to take part in the dialogue about child support practices that affect his life and income. Without access to DCSE records, Plaintiffs argue, McBurney cannot advocate for himself as effectively as a Virginia citizen could. Plaintiffs also argue that VFOIA burdens their abilities to pursue economic interests on equal footing with Virginia residents. They argue that McBurney has been charged the equivalent of a nonresident tax for access to government documents essential to his ability to obtain compensation for DCSE's failure to properly handle his child support claim. Plaintiffs' justification is that the citizens-only clause forces McBurney to abandon his attempt to obtain information or incur extra costs to obtain information available to Virginia citizens. Plaintiffs argue that Hurlbert's ability to pursue economic interests is limited because he is unable to engage in business in Virginia.

With respect to the right to advocate for one's interests, the State Defendant argues that McBurney is free to advocate as much as he pleases, but an unlimited right of "advocacy-facilitation" does not exist. Thus, McBurney does not have a right to have the Commonwealth facilitate advocacy through compelled disclosure. The State Defendant argues that, even if there is a right to engage the political process, it does not follow that Virginia must make advocacy more effective by having State agents locate and forward records to noncitizens.

The State Defendant next argues that no court has ever held that the right to pursue a broad, undefined economic interest is fundamental. Further, the State Defendant argues, McBurney suffered no deprivation of an economic interest as a result of the denial of his VFOIA requests. The State Defendant asserts that the citizens-only provision does not hamper McBurney's ability to pursue economic interests and the fact that Virginia does not supply him with information to the same degree it supplies such information to citizens does not infringe on any economic interest. Accordingly, the State Defendant urges the Court to reject the argument that garnering information to determine whether one should pursue an undefined economic interest is fundamental under the Privileges and Immunities Clause.

The Court finds that the rights to advocate for one's interest and pursue economic interests are not fundamental within the meaning of the Privileges and Immunities Clause. The Supreme Court has held "[i]t is '[only] with respect to those 'privileges' and 'immunities' bearing on the vitality of the Nation as a single entity' that a State must accord residents and nonresidents equal treatment." *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 279 (1985). Plaintiffs have not cited, and this Court has not found, any authority indicating that broad rights to advocate for oneself and pursue economic interests are vital to the Nation as a single entity. Accordingly, VFOIA's citizens-only provision does not violate the Privileges and Immunities Clause by denying Plaintiffs the ability to advocate for their own interests or pursue general economic interests on the same terms as Virginia citizens.

5.        *Substantial                      Justification                      for*  
             *Discrimination Against Noncitizens*

The Privileges and Immunities Clause "[d]oes not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it." *Toomer v. Witsell*, 334 U.S. 385, 396 (1948). Accordingly, a state may discriminate against nonresidents if the state has valid reasons for the discrimination and the discrimination has a close relationship with the state's objectives. *Id.*

Defendants argue that, even if VFOIA's citizens-only provision discriminates against a fundamental privilege, the restriction is permissible because it is closely related to a substantial state interest. Defendants point out that VFOIA's goal is to keep the public informed about the government's actions so that the citizenry can hold elected officials accountable. *See* Va. Code Ann. § 2.2-3700(B). Providing noncitizens access to public records does not help educate Virginians about their government. Further, the close connection between Virginia government and Virginia citizens, and the fact that Virginia citizens bear the burden of paying taxes that support government and the consequences of government action, justify limiting FOIA disclosures to citizens. Finally, Defendants argue that Virginia has a compelling interest in providing government records to citizens in a timely, efficient manner, and responding to out-of-state VFOIA requests would frustrate these interests by diverting time and resources that would otherwise be available for in-state requests.

Plaintiffs maintain that Virginia does not have a substantial state interest in preventing noncitizens from making VFOIA requests and that VFOIA discriminates against noncitizens solely because they are noncitizens. Plaintiffs argue that restricting access to public records does not help Virginians hold elected officials accounta-

ble or prevent government secrecy. To the contrary, allowing more people to access public records leads to more accountability and less secrecy. Plaintiffs also argue that Defendants' attempt to characterize VFOIA's administrative costs as unique to noncitizens should fail because Virginia agencies can recoup the costs of responding to VFOIA requests. Further, prohibiting noncitizens from obtaining documents is not closely tailored to the goal of reducing administrative costs, as all VFOIA requests have administrative costs. For these reasons, Plaintiffs argue Defendants have not demonstrated that there is a substantial reason for VFOIA's citizens-only provision that bears a substantial relationship to the Virginia's objectives.

A court that finds a fundamental right has been violated must then determine if the state has a substantial reason for discriminating against noncitizens and whether the discrimination bears a substantial relationship to the state's objectives. Because this Court finds that VFOIA's citizens-only provision does not violate any fundamental rights, the Court does not reach the issues of whether Virginia has a substantial reason for discriminating against noncitizens with respect to requesting public records or whether the discrimination bears a substantial relationship to the state's objectives.

c. VFOIA Does Not Violate the Dormant Commerce Clause

When engaging in a dormant Commerce Clause analysis, courts must ask if a law discriminates against interstate commerce. *Dep't of Revenue v. Davis*, 553 U.S. 328, 338 (2008) (citing *Or. Waste Sys., Inc. v. Dep't of Env'tl. Quality of Or.*, 511 U.S. 93, 99 (1994)). "Discrimination" in this context means "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Or. Waste Sys.*, 511



U.S. at 99. Discriminatory restrictions on commerce are "virtually per se invalid." *Id.* Nondiscriminatory laws that have incidental effects on interstate commerce, however, are valid "unless 'the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.'" *Id.* (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).

Plaintiffs argue that VFOIA's citizens-only provision violates the dormant Commerce Clause because it facially discriminates against interstate commerce and does not advance a legitimate local concern that cannot be advanced in a nondiscriminatory way. See *Granholm v. Heald*, 544 U.S. 460, 492-93 (2005) ("Our Commerce Clause cases demand more than mere speculation to support discrimination against out-of-state goods. . . . The Court has upheld state regulations that discriminate against interstate commerce only after finding, based on concrete record evidence, that a State's nondiscriminatory alternatives will prove unworkable."). Plaintiffs maintain that Virginia's interest in keeping citizens informed about government does not justify barring noncitizens from accessing public records.

Plaintiffs next argue that VFOIA's citizens-only provision erects barriers to interstate commerce and, consequently, is "virtually per se invalid." See *Env'tl. Tech. Council v. Sierra Club*, 98 F.3d 774, 785 (4th Cir. 1996) (holding that a facially discriminatory statute is "virtually per se" invalid). Plaintiffs argue that VFOIA's citizens-only provision facially discriminates against interstate commerce because it gives Virginia citizens access to public records while barring access for noncitizens. Thus, VFOIA's terms give in-state businesses similar to Hurlbert's an advantage over Hurlbert's out-of-state business. Because of this, Plaintiffs argue that VFOIA is "virtually per se invalid" and can only stand if Defendants demonstrate that the law advances a legitimate,



otherwise unattainable local objective. Plaintiffs maintain that Defendants have not met this burden.

Defendants argue that government services are not commerce and, consequently, are not susceptible to scrutiny under the dormant Commerce Clause. *See Davis*, 553 U.S. at 341 (holding that a state performing a government function "is not susceptible to standard dormant Commerce Clause scrutiny...."). Further, Defendants argue, a government may legitimately limit the services it provides to residents. Because VFOIA does not regulate commercial activity and there are no commercial interests favored by the citizens-only provision, Defendants believe the dormant Commerce Clause is not implicated.

Defendants also argue that VFOIA has nothing to do with the economic protectionism the dormant Commerce Clause was designed to protect against. *See New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273 (1988). Defendants maintain that restricting government documents to citizens so that they may be informed about their government's activities does not constitute economic protectionism. That VFOIA may have some incidental effect on a person who practices a trade outside of Virginia does not change the Commerce Clause analysis.

In determining whether a statute violates the dormant Commerce Clause, "[t]he crucial inquiry ... must be directed to determining whether [the challenged statute] is basically a protectionist measure, or whether it can fairly be viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental. *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). The Court finds that VFOIA's citizens-only provision does not violate the dormant Commerce Clause because VFOIA does not implicate principles of economic protectionism. The statute's purpose is not to protect in-state business, but, instead, is to hold government officials accountable and prevent secrecy in gov-

ernment. *See* Va. Code Ann. § 2.2-3700(B) ("[b]y enacting this chapter, the General Assembly ensures the people of the Commonwealth ready access to public records in the custody of a public body or its officers and employees.... The affairs of government are not intended to be conducted in an atmosphere of secrecy since at all times the public is to be the beneficiary of any action taken at any level of government."). While the law may have some incidental impact on out-of-state business, the goal is not to favor Virginia business over non-Virginia business. Accordingly, VFOIA does not violate the dormant Commerce Clause.

#### IV. CONCLUSION

For the reasons stated above, the Court GRANTS the State Defendant's Motion for Summary Judgment and Little's Cross-Motion for Summary Judgment and DENIES Plaintiffs' Cross Motion for Summary Judgment.

Let the Clerk send a copy of this Memorandum Opinion to all counsel of record.

An appropriate Order shall issue.

/s/

James R. Spencer

Chief United States District Judge

ENTERED this 21st day of January 2011

PUBLISHED

UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

MARK J. MCBURNEY; ROGER  
W. HURLBERT, BONNIE  
STEWART, Professor,  
*Plaintiffs-*  
*Appellants,*  
v.

KENNETH T. CUCCINELLI, II,  
Attorney General, Common-  
wealth of Virginia; NA-  
THANIEL L. YOUNG, Deputy  
Commissioner and Director,  
Division of Child Support En-  
forcement, Commonwealth of  
Virginia; THOMAS C. LITTLE,  
Acting Director of the Real  
Estate Assessment Division,  
Henrico County, Common-  
wealth of Virginia,  
*Defendants-*  
*Appellees.*

No. 09-1615

Appeal from the United States District Court for the  
Eastern District of Virginia, at Richmond.  
James R. Spencer, Chief District Judge.  
(3:09-cv-00044-JRS)

Argued: March 23, 2010

Decided: July 27, 2010

Before GREGORY and AGEE, Circuit Judges, and Eugene E. SILER, Jr., Senior United States Circuit Judge for the Sixth Circuit, sitting by designation.

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Affirmed in part, reversed in part, and remanded by published opinion. Judge Siler wrote the opinion, in which Judge Gregory concurred. Judge Gregory wrote a separate concurring opinion. Judge Agee wrote a separate opinion concurring in part and dissenting in part.

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### COUNSEL

**ARGUED:** Leah Marie Nicholls, INSTITUTE FOR PUBLIC REPRESENTATION, Washington, D.C., for Appellants. Stephen R. McCullough, OFFICE OF THE ATTORNEY GENERAL OF VIRGINIA, Richmond, Virginia, Benjamin Adelbert Thorp, IV, OFFICE OF THE COUNTY ATTORNEY, Henrico County, Henrico, Virginia, for Appellees. **ON BRIEF:** Stephen W. Bricker, BRICKER LAW FIRM, P.C., Richmond, Virginia; Brian Wolfman, INSTITUTE FOR PUBLIC REPRESENTATION, Georgetown University Law Center, Washington, D.C., for Appellants. Craig M. Burshem, Senior Assistant Attorney General, OFFICE OF THE ATTORNEY GENERAL OF VIRGINIA, Richmond, Virginia; Joseph P. Rapisarda, County Attorney, Karen M. Adams, Senior Assistant County Attorney, OFFICE OF THE COUNTY ATTORNEY, Henrico County, Henrico, Virginia, for Appellees.

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### OPINION

SILER, Senior Circuit Judge:

Mark J. McBurney, Roger W. Hurlbert, and Bonnie Stewart (collectively, the "Appellants") appeal the district court's dismissal of their 42 U.S.C. § 1983 action seeking declaratory and injunctive relief against the Attorney General of Virginia, the Deputy Commissioner and Director of Virginia's Division of Child Support Enforcement ("DCSE"), and the Director of the Real Estate Assessment Division in Henrico County, Virginia (collectively, the "Appellees"). Before the district court, the plaintiffs alleged that Virginia's Freedom of Information Act ("VFOIA" or "the Act") violates the dormant commerce clause and the Privileges and Immunity Clause of the U.S. Constitution. The district court dismissed all parties from the suit on jurisdictional grounds, from which order this appeal arises.

For the following reasons, we **AFFIRM** in part, **REVERSE** in part, and **REMAND**.

### I.

The VFOIA provides citizens of the Commonwealth of Virginia with a right of access to all public records held by the Commonwealth, its officers, employees, or agents. Va. Code Ann. §§ 2.2-3700 to .2-3714. In relevant part, the Act provides as follows:

Except as otherwise specifically provided by law, all public records shall be open to inspection and copying by any citizens of the Commonwealth during the regular office hours of the custodian of such records. Access to such records shall not be denied to citizens of the Commonwealth, representatives of newspapers and magazines with circulation in the Commonwealth, and representatives of radio and television stations broadcasting in or into the Commonwealth. The custodian may require the requester to provide his name and



legal address. The custodian of such records shall take all necessary precautions for their preservation and safekeeping.

§ 2.2-3704(A).

On January 21, 2009, McBurney and Hurlbert sued the Attorney General of Virginia, currently Kenneth T. Cuccinelli, II (the "Attorney General"),<sup>9</sup> Nathaniel L. Young, Deputy Commissioner and Director of Virginia's DCSE (the "Deputy Commissioner"), and the Director of the Real Estate Assessment Division in Henrico County, Virginia, currently Thomas C. Little (the "County Director"),<sup>10</sup> pursuant to 42 U.S.C. § 1983. They sought declaratory and injunctive relief from the enforcement of the VFOIA, which they claim violates the Privileges and Immunities Clause and the dormant commerce clause of the U.S. Constitution. The district court later allowed the plaintiffs to amend their complaint to add an additional plaintiff, Bonnie Stewart.

#### *A. Plaintiffs' Claims*

Each plaintiff alleges different facts to support the common argument that the VFOIA violates the U.S. Constitution.

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<sup>9</sup> The complaint named Robert Francis McDonnell, Attorney General at the time of filing. Pursuant to Federal Rule of Civil Procedure 25(d), McDonnell's successor William Cleveland Mims was automatically substituted before the district court. After oral arguments in this case, the Appellees substituted the present named Appellee. For clarity, this opinion will refer to individual Appellees by their office titles.

<sup>10</sup> The complaint named Samuel A. Davis, Director at the time of filing. Prior to oral arguments in this case, the Appellees substituted the current County Director for Davis. *See* Fed. R. Civ. P. 25(d).

### *1. McBurney's Claims*

McBurney, a citizen of Rhode Island, and his wife Lore Mills were divorced in 2002. McBurney filed an application for child support with Virginia's DCSE in July 2006; and, as a result of DCSE's alleged failure to file the proper petition, McBurney claims he was denied "nearly nine months of child support payments."

In 2008, McBurney submitted a VFOIA request to the DCSE seeking disclosure of certain documents that he believed would help resolve this dispute. Specifically he requested "all emails, notes, files, memos, reports, policies, [and] opinions" pertaining to him, his son, or his former wife. The DCSE denied his request on two grounds: first, because the information "[was] confidential and protected under the Virginia Code[,] [ §§ ] 63.2-102 and 63.2-103"; and second, because he was "not a Citizen of [the] Commonwealth of Virginia." McBurney sent a second request, identical to the first except that he listed a Virginia address instead of his Rhode Island address. The DCSE again denied his request. This time, the DCSE only listed McBurney's out-of-state citizenship as its reason for the denial. However, the DCSE did inform McBurney of his right to obtain this information under a different statute, the Government Data Collection and Dissemination Practices Act, Va. Code Ann. §§ 2.2-3800 to .2-3809. Later, McBurney submitted a request under this act and obtained over eighty requested documents.

McBurney contends that he did not receive all the documents he could have received under the VFOIA. He also contends that the DCSE's denial obstructed his right to advocate on his own behalf and prohibited him from utilizing Virginia's dispute resolution procedures, thus violating the Privileges and Immunities Clause.

## *2. Hurlbert's Claims*

Hurlbert, a citizen of California, is the sole proprietor of Sage Information Services. He is in the business of requesting real estate tax assessment records for his clients from state agencies across the United States, including Virginia. On June 5, 2008, Hurlbert submitted a VFOIA request to Henrico County Assessor's Office, which the office denied on the basis of his citizenship. On February 17, 2009, after litigation in this case had commenced, the County provided Hurlbert with an electronic copy of its 2008 real estate assessment database—the subject of the 2008 VFOIA request. Hurlbert's counsel returned this information without reading or reviewing it.

Hurlbert argues that the denial of his VFOIA request was unconstitutional, because it prevents him from pursuing his common calling on an equal basis with Virginia citizens in violation of the Privileges and Immunities Clause, and because it gives Virginia citizens an exclusive right of access to Virginia's public records, in contravention of the dormant commerce clause.

## *3. Stewart's Claims*

Stewart, a citizen of West Virginia and Assistant Professor of Journalism at West Virginia University, submitted her VFOIA request in February 2009 to Virginia Commonwealth University and Virginia Polytechnic Institute and State University ("Virginia Tech"). Stewart's request sought information about the salaries and benefit packages awarded to the presidents of Virginia's public universities and was made in conjunction with a course project on the administration of public universi-

ties in other states. Both institutions denied her request, because she was not a citizen of Virginia.<sup>11</sup>

Stewart claims that the denial of her VFOIA request violates the Privileges and Immunities Clause because it prevents her from pursuing her common calling as an educator on an equal basis with Virginia citizens.

### *B. District Court's Opinion*

The district court granted the defendants' motions to dismiss. First, it held that the Attorney General was not a proper party under the Eleventh Amendment. Because Stewart only alleged claims against the Attorney General, it correspondingly dismissed her as a plaintiff. Second, it held that both McBurney and Hurlbert lacked standing, and dismissed them as plaintiffs. Because McBurney was the only plaintiff to assert claims against the Deputy Commissioner, the district court also dismissed the Deputy Commissioner as a party. Similarly, because only Hurlbert had sued the County Director, the court dismissed him as well. Consequently, no parties remained before the court, and it dismissed the case.

## II.

"[W]e review de novo a district court's legal determination of whether Ex parte Young relief is available." *Franks v. Ross*, 313 F.3d 184, 192-93 (4th Cir. 2002) (internal quotation marks and alterations omitted). Similarly, "[w]e review a district court's dismissal for lack of standing de novo." *Bishop v. Bartlett*, 575 F.3d 419, 423 (4th Cir. 2009) (citations omitted).

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<sup>11</sup> Virginia Tech first claimed that its president operated without a contract, but later stated that the university did not possess any responsive records or, even if it did, it would not release them to her due to her out-of-state citizenship status.

## III.

This case presents two threshold questions: first, whether the Attorney General is immune from suit under the Eleventh Amendment; and second, whether the plaintiffs have standing to sue. As to the first question, we agree with the district court that the Attorney General was not a proper party. We disagree, however, with the district court's ruling on standing, so we reverse that part of its judgment, and remand for proceedings consistent with this opinion.

*A. Sovereign Immunity*

The district court concluded that the Attorney General was not a proper party to the suit under the Eleventh Amendment and the exception announced in *Ex parte Young*. The Appellants appeal this ruling and the district court's consequent dismissal of Stewart.

The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI.

The present suit is thus barred unless it falls within the exception announced by the Supreme Court in *Ex parte Young*, 209 U.S. 123 (1908), which permits a federal court to issue prospective, injunctive relief against a state officer to prevent ongoing violations of federal law, on the rationale that such a suit is not a suit against the state for purposes of the Eleventh Amendment. *Id.* at 159-60. "The requirement that the violation of federal law be ongoing is satisfied when a state officer's enforcement of an allegedly unconstitutional state law is threatened, even if the threat is not yet imminent." *Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316, 330 (4th Cir.



2001) (citation omitted). The *Ex parte Young* exception is directed at "officers of the state [who] are clothed with some duty in regard to the enforcement of the laws of the state, and who threaten and are about to commence proceedings . . . to enforce against parties affected [by] an unconstitutional act." *Ex parte Young*, 209 U.S. at 155-56 (emphasis added). Thus, we must find a "special relation" between the officer being sued and the challenged statute before invoking the exception. *Id.* at 157; *Gilmore*, 252 F.3d at 331. This requirement of "proximity to and responsibility for the challenged state action," *S.C. Wildlife Fed'n v. Limehouse*, 549 F.3d 324, 333 (4th Cir. 2008), is not met when an official merely possesses "[g]eneral authority to enforce the laws of the state," *id.* at 331 (citation omitted). The special-relation requirement protects a state's Eleventh Amendment immunity while, at the same time, ensuring that, in the event a plaintiff sues a state official in his individual capacity to enjoin unconstitutional action, "[any] federal injunction will be effective with respect to the underlying claim." *Id.* at 333.

In dismissing the Attorney General because he lacked a "specific relation" to the VFOIA, the district court took judicial notice of the Attorney General's Web site, which states that the Attorney General's duties include, in pertinent part, "providing legal advice and representation to the Governor and executive agencies, state boards and commissions, and institutions of higher education; defending the constitutionality of state laws when they are challenged in court; and enforcing state laws that protect businesses and consumers." The Appellants now contend that the "special relation" requirement is met, because (1) the Attorney General has a specific statutory duty to enforce the VFOIA against state officials; and (2) even if he does not, his authority to issue official opinions and advice creates the requisite enforcement connection. In response, the Attorney General

disputes the Appellants' interpretation of the VFOIA's enforcement provision, and posits that his general authority to issue advisory opinions is not sufficient to abrogate sovereign immunity under the Eleventh Amendment.

We agree with the Attorney General. First, he does not have a specific statutory duty to enforce the VFOIA against state officials. Although the VFOIA contains an enforcement provision that grants "the attorney for the Commonwealth" authority to petition for an injunction against a state official for a violation of the Act,<sup>12</sup> Va. Code Ann. § 2.2-3713(A), as used throughout the Code, the term "attorney for the Commonwealth," *id.*, refers not to the Attorney General, but rather to the Commonwealth's Attorneys, who are elected local prosecutors. Compare Va. Code Ann. § 2.2-500 (stating that the Attorney General is the "chief executive officer of the Department of Law") with §§ 15.2-1626, 1627 (providing that "every county and city shall elect an attorney for the Commonwealth," and setting forth the office's local prosecutorial duties). See also Va. Code Ann. § 2.2-511 (distinguishing between the duties of the Attorney General and the "attorney for the Commonwealth"). See generally *In re Hannett*, 270 Va. 223, 619 S.E.2d 465 (Va. 2005) (addressing the question of whether to Va. Code Ann. § 19.2-156 provides for the appointment of a local attorney to serve as the "attorney for the Commonwealth" due to

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<sup>12</sup> The provision provides, in pertinent part:

Any person, including the attorney for the Commonwealth acting in his official or individual capacity, denied the rights and privileges conferred by this chapter may . . . enforce such rights and privileges by filing a petition for mandamus or injunction[.]

Va. Code Ann. § 2.2-3713(A).

the prolonged absence of the elected "Commonwealth's Attorney"). Thus, contrary to the Appellants' characterization, the Attorney General does not possess a specific statutory duty to enjoin violations of the Act pursuant to § 2.2-3713(A).

Second, the Attorney General's duty to issue advisory opinions is, like the Governor's duty to uphold the state laws in *Gilmore*, "not sufficient to make [him] the proper part[y] to litigation challenging the law." *Gilmore*, 252 F.3d at 331 (internal quotation marks and citation omitted). Our decision in *Limehouse* does not change this result. In *Limehouse*, the plaintiffs sought to enjoin the Director of South Carolina's Department of Transportation (the "Director") from continuing a project to construct a bridge before the final environmental impact statement ("FEIS") was reconsidered pursuant to federal law. 549 F.3d at 331. In discussing the contours of the *Ex parte Young* doctrine, we stressed the following principles:

This "special relation" requirement ensures that the appropriate party is before the federal court, so as not to interfere with the lawful discretion of state officials. Primarily, the requirement has been a bar to injunctive actions where the relationship between the state official sought to be enjoined and the enforcement of the state statute is significantly attenuated. Such cases have been dismissed on the ground that general authority to enforce the laws of the state is an insufficient ground for abrogating Eleventh Amendment immunity. Thus, the Director's connection to the [state statute] need not be qualitatively special; rather, "special relation" under *Ex parte Young* has served as a measure of proximity to and responsibility for the challenged state action.

This requirement ensures that a federal injunction will be effective with respect to the underlying claim.

*Id.* at 332-33 (internal quotations, citations, and alterations omitted).

We then rejected the Director's argument that he did not have a "special relation" to the National Environmental Policy Act and its state-law analogues. We noted the Director's supervisory authority over the state's participation in the FEIS process, his "deep[] involve[ment]" in preparing the challenged FEIS and procuring permits to proceed with the construction of the bridge on the basis of the FEIS; and, pursuant to federal law, his authority as head of the "joint lead agency" with the Federal Highway Administration (FHWA), given that the two agencies cooperated to draft any environmental document required for the FEIS for the proposed bridge. *Id.* at 333. Thus, we concluded that the Director possessed "a sufficient connection to the alleged violation of federal law" to establish a "special relation" under *Ex parte Young*. *Id.* In contrast, the Attorney General's authority over the VFOIA is "significantly [more] attenuated." *Id.* As discussed supra, the Attorney General has no specific statutory enforcement authority under the VFOIA. In addition, he has not issued any advisory opinions specifically directing state agencies to deny VFOIA requests by non-citizens,<sup>13</sup> nor has he participated in the deci-

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<sup>13</sup> Although the Appellants claim that the Attorney General has issued "hundreds" of advisory opinions on similar facts, they do not point us to any particular opinion in which the Attorney General has instructed state agencies not to process VFOIA requests by non-citizens. The opinions cited by the Appellants—2 Op. Att'y Gen. 95 (2002) (regarding the circuit court clerk's duty to provide access to digital copies of the court's database of judicial or court records), and 2 Op. Att'y Gen. 149 (2003) (regarding the VFOIA's exception  
(continued ...)



sionmaking process of those agencies. Thus, his general authority to issue advisory opinions, in the abstract, is not sufficient to establish a "special relation" for *Ex parte Young* purposes.

In addition, our holding is consistent with those of our sister circuits that have dismissed the Attorney General when no special relation existed between his office and the challenged statute. See *Okpalobi v. Foster*, 244 F.3d 405 (5th Cir. 2001) (en banc) (plurality opinion) (holding that Attorney General was not a proper party where plaintiffs challenged a Louisiana statute that provided a private cause of action against doctors who performed abortions, because the Attorney General did not have a special enforcement connection to the statute); *Smith v. Beebe*, 123 F. App'x 261 (8th Cir. 2005) (holding that Attorney General was not a proper party in a § 1983 action, because he did not bear a special relation to a challenged tolling provision). We express no opinion on whether a special relationship would exist if an agency relies on an advisory opinion explicitly interpreting VFOIA to apply only to Virginia citizens. See *Gay Lesbian Bisexual Alliance v. Evans*, 843 F. Supp. 1424, 1426 (M.D. Ala. 1993) (holding that the Attorney General of Alabama was a proper party in a suit challenging an Alabama statute that prohibited universities from allocating

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from disclosure for confidential information)—are inapposite, as they merely quote the "citizens of the Commonwealth" language in addressing other legal questions under the Act. Similarly, although the Appellants refer us to the Attorney General's discussion of the Act's procedures on the official Web site, the site does not specifically direct agencies to deny claims by citizens, again merely parroting the broad "citizen" language of the statute. See Va. Coal. for Open Gov't, FOIA Overview & FAQs, <http://www.opengovva.org/virginiasfoia-the-law/foia-overview-a-faqs-lawmenu-156> (last visited April 12, 2010).



public funds to support any group that promoted lifestyles prohibited by sodomy and sexual misconduct laws, because the university enforced the statute "allegedly in reliance on an 'advisory opinion' from the Attorney General"),<sup>14</sup> *aff'd sub nom. Gay Lesbian Bisexual Alliance v. Pryor*, 110 F.3d 1543 (11th Cir. 1997) (affirming, without discussing, this holding).

Finally, even were we to find a special relation, we cannot apply *Ex parte Young* because the Attorney General has not acted or threatened to act. *See Ex parte Young*, 209 U.S. at 155-56; *Gilmore*, 252 F.3d at 330. The Attorney General has neither personally denied any of the Appellant's VFOIA requests nor advised any other agencies to do so. *Cf. Minner v. Lee*, 458 F.3d 194, 198-202 (3d Cir. 2006) (holding that Delaware's FOIA violated the Privileges and Immunities Clause and affirming the district court's injunction barring the Attorney General from enforcing the law where plaintiff requested records from the Attorney General). Moreover, the Appellants do not allege that the Deputy Commissioner or the County Director relied on the Attorney General's advice in denying their VFOIA requests. *See Pryor*, 110 F.3d 1543 (affirming, without discussing, the district court's decision that the Attorney General of Alabama was a proper party, because the university relied "on a

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<sup>14</sup> In *Evans*, the University of South Alabama requested an Attorney General opinion regarding the disbursement of its funds to a student group, the Gay Lesbian Bisexual Alliance; received an opinion that stated the funds should not be released; and acted in reliance on that opinion to deny funding, an act which, the plaintiffs argued, violated their First Amendment rights. *Evans*, 843 F. Supp. at 1426. In the instant case, however, the Attorney General was not requested for, nor did he issue advice respecting, the denial of claims under the VFOIA based on a claimant's non-citizenship.

specific 'advisory opinion' from the Attorney General"). Because the Attorney General has not enforced, threatened to enforce, or advised other agencies to enforce the VFOIA against the Appellants, the *Ex parte Young* fiction cannot apply. See *Ex parte Young*, 209 U.S. at 155-56. We affirm the district court's dismissal of the Attorney General and Stewart from the suit.

### *B. Standing*

McBurney and Hurlbert next argue that the district court improperly dismissed them on standing grounds. The "irreducible constitutional minimum of standing" requires (1) "an injury in fact—a harm suffered by the plaintiff that is concrete and actual or imminent, not conjectural or hypothetical"; (2) "causation—a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant"; and (3) "redressability—a likelihood that the requested relief will redress the alleged injury." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102-03 (1998) (internal quotation marks and citations omitted); see *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 154 (4th Cir. 2000) (en banc) (same). "The standing doctrine, of course, depends not upon the merits, but on whether the plaintiff is the proper party to bring the suit." *White Tail Park, Inc. v. Stroube*, 413 F.3d 451, 460 (4th Cir. 2005) (internal quotation marks, citations, and alteration omitted). Indeed, "[i]f a plaintiff's legally protected interest hinged on whether a given claim could succeed on the merits, then every unsuccessful plaintiff will have lacked standing in the first place." *Id.* at 461.

#### *1. McBurney*

The VFOIA contains several exemptions to protect confidential information, including an exemption from disclosure of "[a]ll records . . . that pertain to . . . child

support enforcement." Va. Code Ann. § 63.2-102. The district court concluded that McBurney lacked standing because he failed to allege an injury, based on its conclusion that the records requested were not available under the VFOIA. Specifically, the district court concluded that the DCSE denied McBurney's request because all the requested materials were confidential and thus exempt from disclosure under the Act regardless of his citizenship. McBurney now argues that some of the requested documents were not confidential documents and that the DCSE's denial with respect to these documents was based solely on the grounds of his non-citizenship.

It is undisputed that although McBurney received more than eighty documents related to his child support case under a different statute, he did not receive general policy information (i.e., documents discussing how the DCSE administers cases like his), information that would arguably not fall within the Act's exemption for confidential documents. The Deputy Commissioner insists that McBurney never made a request for such general policy information. However, McBurney's request sought "[a]ny and all treatises, statutes, legislation, regulations, administrative guidelines, or any other reference material that the DSS and/or DCSE relies upon in actioning or administering child support cases where one parent is overseas." Thus, he has Article III standing to sue, because he has shown (1) injury in fact (lack of possession of the requested general policy information); (2) causation (the Deputy Commissioner continues to deny access to these records, although the basis for such denial is not clear); and (3) redressability (for which release of the information would remedy). See *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 449 (1989) (recognizing that the Court's "decisions interpreting the [FOIA] have never suggested that those requesting information under it need show more than that they sought and were

denied specific agency records"). The district court thus erred in dismissing McBurney.

## 2. *Hurlbert*

The district court held that Hurlbert did not have standing because he failed to plead either (1) monetary relief or (2) an ongoing injury as required for declaratory or injunctive relief. The district court acknowledged that "Hurlbert's counsel in responsive briefs and out-of-court documents alludes to Hurlbert making future [V]FOIA requests," but it refused to credit such assertions and held that the pleadings did not support a finding of Article III jurisdiction.

On appeal Hurlbert argues that the district court erred. He asserts that the court should have considered evidence outside of the pleadings, specifically, his affidavit submitted to support his cross-motion for a preliminary injunction. In this affidavit, he averred that after his VFOLA request was denied he "was dissuaded from making any further VFOLA requests in Henrico County." He also contends that even if the court properly confined its analysis to the pleadings, it ignored portions of his complaint that implied an ongoing injury. The County Director argues that "[t]he existence of facts not pled . . . are irrelevant when considering a motion to dismiss," citing *Bishop v. Bartlett*, 575 F.3d 419 (4th Cir. 2009), in support.

Here, the amended complaint itself is best read to plead an ongoing injury:<sup>15</sup> in paragraph 36 Hurlbert alleged that the Act "makes it impossible" for him to "pursue his common calling by obtaining Virginia public rec-

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<sup>15</sup> Because the complaint states an ongoing injury, we do not address whether the district court should have considered Hurlbert's affidavit.



ords through the VFOIA on an equal basis with Virginia's citizens."<sup>16</sup> Given that the complaint stated sufficient facts to support standing,<sup>17</sup> the district court erred in dismissing Hurlbert for lack of standing.<sup>18</sup>

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<sup>16</sup> As the dissent quite rightly points out, this statement is "a conclusion of law derived from the factual assertions in paragraphs 15 and 16." *Infra* at 32. The dissent objects to our "unwarranted" reliance on this "lone allegation," *infra* at 31, and posits that "[t]here are simply no factual allegations supporting the conclusion that Hurlbert suffered a prospective, ongoing injury that is 'concrete and particularized' as to the amended complaint," *infra* at 33 (internal quotation marks omitted). We respectfully disagree with this characterization. We read the conclusion of law in paragraph 36 in context with the very facts pled in paragraphs 15 and 16 of the complaint: (1) Hurlbert "is the sole proprietor of Sage Information Services"; (2) his May 2008 request had been denied on the basis of his non-citizenship; (3) he "is in the business of obtaining real estate tax assessment records"; and (4) he "obtains these records by submitting FOIA requests to state governmental agencies." We agree with the dissent that the conclusion of law in paragraph 36, standing alone, would not be sufficient to plead an ongoing injury; however, when read with Hurlbert's factual allegations, we find it to be so. The factual allegations demonstrated that Hurlbert is the sole proprietor of a company that makes a business of submitting FOIA requests to states and federal agencies. We find that these facts are "sufficiently real and immediate to show an existing controversy." *Infra* at 33 (quoting *Comite de Apoyo a los Trabajadores Agrícolas*, 995 F.2d 510, 515 (4th Cir. 1993)).

The dissent also states that "[o]nce the Director provided Hurlbert with the data he sought, Hurlbert failed to plead any additional facts in his amended complaint indicating that he was likely to make additional requests for such information in the immediate future." *Infra* at 33. Because Hurlbert's amended complaint "mirrored" his complaint, the dissent concludes that "inferring an ongoing injury from the single sentence in paragraph 36 is simply too speculative and conjectural." *Id.* at 34 (internal quotation marks omitted). Because we read the complaint as a whole to be sufficient, we respectfully disagree.

<sup>17</sup> *Bishop* does not change this analysis, because in *Bishop* the  
(continued ...)



### C. Constitutional Claims

We decline to address the merits of the Appellants' claim, and instead remand for the district court to consider Hurlbert's and McBurney's claims in light of our holding that they have standing to sue.

**AFFIRMED** in part, **REVERSED** in part, and **REMANDED** for the district court to proceed consistent with this opinion.

GREGORY, Circuit Judge, concurring:

After erroneously concluding that appellant Hurlbert lacked standing to proceed with his claim, the district court stated that even if Hurlbert had standing "it is un-

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plaintiffs did not allege any injury at all. In *Bishop*, four North Carolina citizens challenged the process by which a constitutional amendment was placed before voters, arguing that it violated the Due Process Clause of the Fourteenth Amendment. 575 F.3d at 421. The district court dismissed the case for lack of standing, a decision we affirmed. *Id.* at 422. First, we noted that in the complaint the plaintiffs "did not allege that they had actually been misled by the ballot language." *Id.* at 422. In fact, they later "acknowledged that even though each of them had voted in the November 2004 election, [not one of them was] misled by the ballot language." *Id.* Thus, we agreed with the district court that there was no injury in fact. *Id.* at 424.

<sup>16</sup> The County Director also argues that Hurlbert's claim is moot, because he was provided with the requested records. However, because Hurlbert has pleaded an ongoing injury, the fact that the government provided him with past records requested does not moot his claim going forward. See *Friends of the Earth, Inc. v. Laidlaw Env't Servs.*, 528 U.S. at 167, 190 (2000) ("[A] defendant claiming that its voluntary compliance moots a case bears a formidable burden of showing that it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." (citation omitted)).

likely that [he] would have succeeded on the merits." *McBurney v. Mims*, No. 3:09-CV-44, 2009 U.S. Dist. LEXIS 36971, at \*23 (E.D. Va. May 1, 2009). In my view, this conclusion is based on a clearly incorrect interpretation of the Privileges and Immunities Clause. So while I join Judge Siler's opinion in full, I write separately to address a legal error that appears likely to recur without further guidance from this Court. See *Levy v. Lexington County, S.C. Sch. Dist. Three Bd. of Tr.*, 589 F.3d 708, 716 (4th Cir. 2009).

The Privileges and Immunities Clause in Article IV Section 2 of the Constitution requires that states treat their residents and nonresidents alike in matters "'bearing on the vitality of the Nation as a single entity.'" *Sup. Ct. of N.H. v. Piper*, 470 U.S. 274, 279 (1985) (quoting *Baldwin v. Mont. Fish & Game Comm'n*, 436 U.S. 371, 383 (1978)). The Clause protects several rights, including the right of one state's citizens to engage in economic activity in another state "on terms of substantial equality with the citizens of that State." *Toomer v. Witsell*, 334 U.S. 385, 396 (1948). Specifically, the Supreme Court has held that under the Privileges and Immunities Clause, states may not discriminate against nonresidents when distributing professional licenses, nor may they prohibit non-residents from engaging in economic activity that residents may engage in. See *Piper*, 470 U.S. at 280 (explaining the Court's precedent and holding that states may not prohibit non-residents from practicing law in the state). Stated differently, the Clause prohibits states from discriminating against non-residents' pursuing a "common calling." *Baldwin*, 436 U.S. at 383; *O'Reilly v. Bd. of Appeals*, 942 F.2d 281, 284 (4th Cir. 1991).

Though this prohibition is not absolute, a state's attempt to burden a right protected by the Privileges and Immunities Clause triggers heightened judicial scrutiny. A state may only discriminate against another state's cit-

izens on matters that implicate the Privileges and Immunities Clause if it has a "substantial reason" for the discriminatory practice and that practice "bears a substantial relationship to the state's objectives." *Piper*, 470 U.S. at 284; *O'Reilly*, 942 F.2d at 284.

Notably, the only circuit to consider an analogous citizens-only provision found that the provision did violate the Privileges and Immunities Clause. *Lee v. Minner*, 458 F.3d 194, 195 (3d Cir. 2006). The Third Circuit in *Lee* held that the citizens-only provision in Delaware's Freedom of Information Act violated the plaintiff's fundamental right to "engage in the political process with regard to matters of national importance on equal terms with state residents."\* *Id.* at 199. Though the court noted that Delaware had a substantial interest in establishing and defining its own political community, it dismissed the state's argument that the citizens-only provision bore a substantial relationship to that interest, and held that denying noncitizens information did nothing to make the citizenry more cohesive. *Id.* at 201.

The district court apparently gave little or no weight to our sister circuit's rationale. Rather, it interpreted our decision in *O'Reilly* as requiring a particularly high level of interference with a noncitizen's common calling by the state to implicate the Privileges and Immunities Clause. The district court also interpreted the Supreme Court's decision in *Piper* to mean that a state must burden the right "with the aim of improving the competitive advantage of [its] citizens over non-citizens" in order to violate the Constitution. *McBurney*, 2009 U.S. Dist. LEXIS 36971, at \*24. Neither of these readings is correct.

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\* Though the plaintiff also alleged that Delaware's provision violated his right to pursue a common calling, the court declined to address this argument. *Lee*, 458 F.3d at 199.

In *O'Reilly*, we held that a Maryland licensing regulation burdened the right to pursue a common calling and violated the Privileges and Immunities Clause where it prohibited non-resident cab drivers from picking up fares in a specific county. 942 F.2d at 284. At no point did we suggest that the state had to severely burden that right in order to implicate the constitutional protection; instead we invalidated the regulation simply because it burdened the plaintiff's right, without regard to the burden's severity or degree. *Id.* The extent of any burden might well be an appropriate consideration when analyzing whether the challenged action bears a "substantial relationship" to a state's important interest, but generally is not relevant in deciding whether there is a burden in the first instance. After all, the Framers did not view one state's discrimination against another state's citizens in isolation, but rather considered the prospect of other states' responding with reciprocal and retaliatory burdens that, in the aggregate, could threaten the Nation's economic unity. *See Toomer*, 334 U.S. at 395-96.

Likewise, nowhere in *Piper* – nor in any other case of which I am aware – has the Supreme Court limited application of the Privileges and Immunities Clause to those instances in which a state passes a statute "with the aim of improving the competitive advantage of its citizens over non-citizens." *McBurney*, 2009 U.S. Dist. LEXIS 36971, at \*24. (emphasis added). The Court in *Piper* did not find that New Hampshire refused to license out-of-state attorneys with "the aim" of benefiting resident lawyers, but rather found that it impermissibly burdened nonresidents' right to pursue their common calling even assuming the state's aim was unrelated to any desire to regulate economic competition. *See* 470 U.S. at 283. Again, the state's goal is surely relevant when determining whether any burden on nonresidents' pursuit of a common calling is justified by the state's substantial interest, *id.* at 285, but is of no moment when



determining whether the challenged statute burdens a fundamental right in the first instance.

Appellant Hurlbert operates a business in California that collects and synthesizes information for a particular audience and sells it for profit. He alleges that from time to time he seeks access to information contained in Virginia's official records as part of the services he provides to clients. And, as Judge Siler's opinion quite correctly notes, he claims that Virginia will continue to deny him access to much of this information while providing it to Virginia residents. These allegations, if true, make out a classic common-calling claim under the Privileges and Immunities Clause.

The ability to quickly and efficiently gather and disseminate information is central to a great deal of economic activity in our aptly-named Information Age. The individual or business that can access relevant information quickest and most efficiently has a distinct advantage when competing in the advertising, technology, entertainment, and business arenas. A statute that discriminates against a nonresident's ability to access information therefore implicates the right to pursue a common calling in the Twenty-First century in much the same way that it would if it burdened an angler's ability to catch fish, see *Toomer*, 334 U.S. at 396-97, or a cabby's ability to drive fares in the Twentieth, see *O'Reilly*, 942 F.2d at 284. Because such a statute burdens a protected right, it is then incumbent upon the state to prove that the statute withstands heightened scrutiny.

The district court did not properly engage in this analysis below. In my view, it must do so on remand when fully considering the plaintiffs' substantive legal claims and factual contentions in order to avoid committing reversible error. As nothing in Judge Siler's opinion suggests otherwise, I join in that opinion.



AGEE, Circuit Judge, concurring in part and dissenting in part:

I concur in the majority opinion except as to section III(B)(2). I write separately as to that section because I do not find that Roger W. Hurlbert has adequately pled an ongoing injury sufficient to confer standing. Accordingly, I respectfully dissent as to section III(B)(2) of the majority opinion and I would affirm the district court's judgment with respect to Hurlbert.

I.

In June 2008 Hurlbert made a telephone request pursuant to VFOIA for real estate records in the possession of the Director of the Real Estate Assessment Division of Henrico County, Virginia ("the Director"). When that request was denied, Hurlbert filed suit against the Director, who filed his answer to Hurlbert's initial complaint on February 16, 2009. By letter dated the next day, February 17, 2009, the Director provided Hurlbert with the requested data.

On March 10, 2009, the Director filed a motion to dismiss Hurlbert's suit pursuant to Rule 12(c) and Rule 12(h)(3) based, in part, on a "[l]ack of [j]urisdiction." J.A. 54A. In the memorandum of law accompanying his motion, the Director specifically argued that Hurlbert lacked standing based on the incongruence between his allegations of past injury and his request for prospective relief.<sup>19</sup> It is clear from the record that, at least by March

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<sup>19</sup> In his memorandum of law submitted to the district court the Director argued that: "[Hurlbert's] Complaint does not allege that denial of these materials caused him any particularized harm, nor has he requested monetary damages. More tellingly, Mr. Hurlbert has also failed to allege that he intends to make a similar request of Mr. Davis in the future or is otherwise likely to again be denied public records by Mr. Davis or the County of Henrico's Real Estate As-

(continued ...)

10, 2009, Hurlbert was aware that his standing was at issue. Despite this knowledge, the plaintiffs, including Hurlbert, filed an amended complaint on March 18, 2009 that did not materially alter Hurlbert's allegations and, indeed, repeated them almost verbatim. The specific allegations in the amended complaint pertaining to Hurlbert are as follows:

15. Plaintiff Roger Hurlbert is the sole proprietor of Sage Information Services. Mr. Hurlbert is in the business of obtaining real estate tax assessment records. Mr. Hurlbert obtains these records by submitting FOIA requests to state governmental agencies.

16. Mr. Hurlbert submitted a FOIA request to the Henrico County Real Estate Assessor's Office pursuant to Virginia Code § 2.2-3704. The request was made by telephone on June 5, 2008. In that telephone conversation, an official from the Assessor's Office denied Mr. Hurlbert's FOIA request. The only reason the official gave for denying the request was that Mr. Hurlbert is not a citizen of Virginia.

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36. A state law that denies non-citizens the right to pursue their common calling violates Article IV's Privileges and Immunities Clause. The Henrico County Assessor's Office denied Mr. Hurlbert access to public records based on the citizens-only provision in Virginia Code § 2.2-3704. Section 2.2-3704 makes it impossible for Mr. Hurlbert to pursue his common calling by obtaining Virginia public records

through Virginia's FOIA on an equal basis with Virginia's citizens. This discrimination contravenes the Privileges and Immunities Clause.

J.A. 62A-67A.

The final paragraph of the amended complaint contains a vague general statement alleging irreparable harm:

42. Deprivation of a constitutional right constitutes irreparable harm. The citizens-only provision in Virginia Code § 2.2-3704 denies the Plaintiffs access to information. As a result, the provision bars the Plaintiffs from participating in a range of economic, political, and social activities . . . .

J.A. 69A.

The Director argues that Hurlbert lacks standing because "Hurlbert alleged only one discrete instance where his alleged constitutional rights were violated." Br. of Appellee at 31. In other words, the Director asserts there is a fatal variance between the past injury alleged and the prospective remedies sought. I agree.

## II.

### A.

"It is elementary that the burden is on the party asserting jurisdiction to demonstrate that jurisdiction does, in fact, exist." *Lovern v. Edwards*, 190 F.3d 648, 654 (4th Cir. 1999); *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982) ("The burden of proving subject matter jurisdiction on a motion to dismiss is on the plaintiff, the party asserting jurisdiction.").

In this case, the Director challenged Hurlbert's standing by filing a motion for judgment on the pleadings pursuant to Rule 12(c). "[W]e review the district

court's dismissal [under Rule 12(c)] *de novo* and in doing so apply the standard for a Rule 12(b)(6) motion." *Edwards v. City of Goldsboro*, 178 F.3d 231, 243 (4th Cir. 1999). "The purpose of a Rule 12(b)(6) motion is to test the sufficiency of a complaint; 'importantly, [a Rule 12(b)(6) motion] does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses.'" *Id.* (quoting *Republican Party v. Martin*, 980 F.2d 943, 952 (4th Cir. 1992) (alteration in original)).

Clearly, by moving for judgment on the pleadings, the Director's motion to dismiss was designed to test the sufficiency of Hurlbert's allegations as a basis for subject matter jurisdiction. In his memorandum of law submitted to the district court the Director argued that:

[Hurlbert's] Complaint does not allege that denial of [the data] caused him any particularized harm, nor has he requested monetary damages. More tellingly, Mr. Hurlbert has also failed to allege that he intends to make a similar request of Mr. Davis in the future or is otherwise likely to again be denied public records by Mr. Davis or the County of Henrico's Real Estate Assessment Division.

Dist. Ct. Docket No. 21 at 6. The Director did not challenge the veracity of the facts pled and, indeed, had already admitted in his answer to the initial complaint that his office had received a written request from Hurlbert seeking records pursuant to VFOIA. J.A. 26A-27A.

On appeal, Hurlbert first puts forth a procedural argument, claiming "[t]he district court erred when it confined its standing inquiry to the Amended Complaint alone . . . ." Br. of Appellant at 26. Specifically, Hurlbert avers that the district court should have considered his declaration, filed after his initial complaint, in which he stated that after the Director denied his request for data, he "was dissuaded from making any further FOIA re-

quests in Henrico County." J.A. 49A. However, the district court was not obligated to go beyond the pleadings in resolving the Director's motion to dismiss.

Hurlbert cites *Warth v. Seldin*, 422 U.S. 490 (1975) in support of his position that the district court was required to consider materials outside the pleadings in adjudicating the motion to dismiss. *Warth* stands only for the proposition, clearly in accord with our precedent, that a district court *may*, but is not *required*, to consider such materials. See *Warth*, 422 U.S. at 501 (explaining that while "both the trial and reviewing courts must accept as true all material allegations of the complaint," "it is within the trial court's power to allow or to require the plaintiff to supply, by amendment to the complaint or by affidavits, further particularized allegations of fact deemed supportive of plaintiff's standing").

Hurlbert also relies on our statement in *Richmond, Fredericksburg & Potomac R.R. Co. v. United States*, 945 F.2d 765 (4th Cir. 1991) that "[i]n determining whether jurisdiction exists, the district court is to regard the pleadings' allegations as mere evidence on the issue, and *may* consider evidence outside the pleadings without converting the proceeding to one for summary judgment." 945 F.2d at 768 (emphasis added). Not only did that case also make the district court's consideration of non-pleading material permissive rather than mandatory, it also involved a motion under Rule 12(b)(1) which, unlike the Rule 12(c) motion to dismiss filed in this case, is unaffected by Rule 12(d). Rule 12(d) specifically addresses a district court's consideration or exclusion of materials outside the pleadings.<sup>20</sup>

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<sup>20</sup> Rule 12(d) provides:

If, on a motion under *Rule 12(b)(6)* or *12(c)*, matters outside the pleadings are presented to *and not excluded by the*  
(continued ...)



For the first time on appeal, Hurlbert argues in his reply brief that "[b]y submitting non-pleading materials with his motion, [the Director] expanded the scope of the standing inquiry beyond the logical sufficiency of the complaint to include factual evidence bearing on the truth of Hurlbert's allegations." Reply Br. of Appellant at 8. We need not address any such argument, however, as any argument raised for the first time in a reply brief has been abandoned. *Edwards*, 178 F.3d at 241 n.6; see also *U.S. ex rel. Vuyyuru v. Jadhav*, 555 F.3d 337, 356 n.8 (4th Cir. 2009) (citing *Yousefi v. INS*, 260 F.3d 318, 326 (4th Cir. 2001)); *United States v. Al-Hamdi*, 356 F.3d 564, 571 n.8 (4th Cir. 2004).

In my view, Hurlbert's argument would have no merit in any event. A plain reading of the district court's opinion reveals that it did not rely on non-pleading materials submitted by either party in reaching its decision regarding Hurlbert's standing. Therefore, Rule 12(d) simply would not apply.<sup>21</sup>

"As is true of practice under Rule 12(b)(6), it is well-settled that it is within the district court's discretion whether to accept extra-pleading matter on a motion for judgment on the pleadings and treat it as one for summary judgment or to reject it and maintain the character of the motion as one under Rule 12(c)." 5C Charles Alan Wright & Arthur R. Miller, *Federal Practice and Proce-*

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court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

Fed. R. Civ. P. 12(d) (emphasis added).

<sup>21</sup> Moreover, the term "dissuaded" in Hurlbert's declaration is insufficiently descriptive to establish an actual or imminent injury-in-fact.

*dure* § 1371 (3d ed. 2010). As the Eleventh Circuit has recently explained, "[a] judge need not convert a motion to dismiss into a motion for summary judgment as long as he or she does not consider matters outside the pleadings." *Harper v. Lawrence County*, 592 F.3d 1227, 1232 (11th Cir. 2010). I agree with our sister circuit's view that "'not considering' such matters is the functional equivalent of 'excluding' them—there is no more formal step required." *Id.*

For the reasons set forth above, the district court was not required to consider Hurlbert's declaration nor was it required to convert the proceeding to one for summary judgment.

## B.

To possess the constitutional component of standing, a party must meet three requirements:

(1) [the party] has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

*Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000) (citing *Lujan*, 504 U.S. 555, 560-61 (1992)); *Bishop v. Bartlett*, 575 F.3d 419, 423 (4th Cir. 2009). As the party invoking federal jurisdiction, Hurlbert bears the burden of establishing these elements. *Long Term Care Partners, LLC v. United States*, 516 F.3d 225, 231 (4th Cir. 2008).

Of course, Plaintiffs need not "await the consummation of threatened injury to obtain preventive relief." *Blum v. Yaretsky*, 457 U.S. 991,

1000 (1982). Instead, where a party seeks prospective relief, "[t]he question becomes whether any perceived threat to [the plaintiff] is sufficiently real and immediate to show an existing controversy." *Id.*; see also *Lujan*, 504 U.S. at 564 (examining imminence of asserted injury); *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983) (examining likelihood that plaintiff would suffer future injury).

*Long Beach Area Chamber of Commerce v. City of Long Beach*, 603 F.3d 684, 689 (9th Cir. 2010).

To meet the "injury in fact" requirement, Hurlbert bears the burden of proving "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (internal citations and quotations omitted). While Hurlbert arguably pled a concrete and actual injury – the denial of his VFOIA request – sufficient to confer standing at the time he filed suit, he did not plead any ongoing injury sufficient to maintain standing for declaratory and injunctive relief.

The allegations in paragraphs 15 and 16 of the amended complaint clearly indicate that Hurlbert pled only that he suffered an alleged past injury as a result of the Director's denial of his June 2008 request. He pled no future harm that he might reasonably expect to suffer as a result of Virginia's residency requirement. Even though Hurlbert pled a past injury and knew that his standing had been challenged, he nonetheless filed an amended complaint that did not request compensatory damages for his losses arising out of the Director's June 2008 denial. Instead, he sought a court order:

1. Declaring that Virginia Code § 2.2-3704 violates the Privileges and Immunities Clause of Article IV and the dormant Commerce Clause of the United States Constitution;

2. Enjoining the Defendants from enforcing the citizens-only provision of Virginia Code § 2.2-3704;
3. Awarding the Plaintiffs their costs and reasonable attorneys fees pursuant to 42 U.S.C.A. § 1988(b); and
4. Granting the Plaintiffs such other relief as the Court may deem just and proper.

J.A. 18A.

The district court was therefore confronted, incongruously, with pleadings that sought prospective declaratory and injunctive relief based only on a single past (and since remedied) harm. As a result, I would find the district court correctly determined "that [Hurlbert] has not adequately pled an ongoing injury, but bases his claims solely on not receiving the documents he requested" in June 2008. J.A. 84A.

Although Hurlbert's failure to plead an ongoing injury in fact is, in and of itself, fatal to his standing, his pleadings also fail to establish the element of redressability. As the district court explained:

If [Hurlbert] had alleged a continuing violation *or the imminence of a future violation*, the injunctive relief requested would remedy the alleged harm. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 108-09 (1998). But no such allegation is made in either [Hurlbert's] original or amended complaint, and therefore the Complaint fails to confer Hurlbert with standing as an injunction, which provides relief from a future harm, cannot redress [his] claim of a singular, past wrong.

J.A. 84A (emphasis added). Once the Director provided Hurlbert with the information he sought, the "controversy" Hurlbert pled, the denial of information in June 2008,

had been resolved. As a result, his allegations lack two of the three elements required for standing – injury in fact and redressability.<sup>22</sup>

The majority relies on Hurlbert's lone allegation that "Section 2.2-3704 makes it impossible for [him] to pursue his common calling by obtaining Virginia public records through Virginia's FOIA on an equal basis with Virginia's citizens," J.A. 17A, 67A, and concludes that "the complaint itself is best read to plead an ongoing injury . . . ." *Supra* at 16. In my view, this reliance is unwarranted.<sup>23</sup>

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<sup>22</sup> Although my dissent is based on the dissonance between Hurlbert's allegations of past harm and his request for prospective relief, I would also find that his claims are moot. Hurlbert argues that "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *Friends of the Earth*, 528 U.S. at 189. I find no merit in Hurlbert's argument because it presupposes that declarative and injunctive relief are "[t]he only effective remedies for [his] *ongoing injury*." Br. of Appellant at 28 (emphasis added). In finding that he has not pled an ongoing injury but only a past single incident that has since been remedied, I see no reason why the mootness doctrine would not likewise bar his claim.

<sup>23</sup> The majority disagrees with my assertion that it relies only on the allegation in paragraph 36 of the amended complaint and avers that it "read[s] the conclusion of law in paragraph 36 in context with the very facts pled in paragraphs 15 and 16 of the complaint" and "read[s] the complaint as a whole." But when read in context, Hurlbert's statements that he "is the sole proprietor of Sage Information Services," a company that "is in the business of obtaining real estate tax assessment records," and that he "obtains these records by submitting FOIA requests to state governmental agencies" are merely prefatory to his only concrete and particularized allegation of damage. This allegation--alleged in the past tense--asserts only that he "submitted a FOIA request" that was "denied." J.A. 62A. With respect to my colleagues, the fact that he "is" in the business of making such requests and once made such a request that had been denied does not demonstrate that an additional request was "actual or imminent." The facts alleged simply did not indicate that any threat to

(continued ...)



Hurlbert repeated in both his initial and amended complaints that VFOIA "makes it impossible . . . to pursue his common calling by obtaining Virginia public records . . . on an equal basis with Virginia's citizens." The majority views this statement as sufficiently pleading an ongoing injury. I disagree. Considered in context, I believe the statement is more appropriately read as a conclusion of law derived from the factual assertions in paragraphs 15 and 16. Such a reading comports with the language in the complaints.

First, use of the legal term of art "common calling" evinces a legal, versus colloquial, meaning.<sup>24</sup> The Supreme Court's longstanding jurisprudence establishes that a state may not, in most circumstances, interfere

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Hurlbert was "sufficiently real and immediate to show an existing controversy." *Blum*, 457 U.S. at 1000.

<sup>24</sup> The Supreme Court has repeatedly emphasized that the Privileges and Immunities Clause of the federal Constitution protects the rights of citizens in one state to transact business in another state "on terms of substantial equality with the citizens of" the other state. *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 280 (1985); *Toomer v. Witsell*, 334 U.S. 385, 395 (1948) (stating that the Clause "was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy"); see e.g. *Supreme Court of Va. v. Friedman*, 487 U.S. 59, 70 (1988) (holding "that Virginia's residency requirement for admission to the State's bar without examination violates the Privileges and Immunities Clause"). This has been referred to as the fundamental right to pursue a common calling. See *United Bldg. & Constr. Trades Council v. Mayor and Council of Camden*, 465 U.S. 208, 219 (1984) ("Certainly, the pursuit of a common calling is one of the most fundamental of those privileges protected by the Clause."); *Hicklin v. Orbeck*, 437 U.S. 518, 524 (1978) ("Appellants' appeal to the protection of the Clause is strongly supported by this Court's decisions holding violative of the Clause state discrimination against nonresidents seeking to ply their trade, practice their occupation, or pursue a common calling within the State.") .

with a nonresident's pursuit of a common calling. In light of this clarity, the sentence at issue in paragraph 36 is nothing more than a restatement of the legal determination to be made by the district court – whether the Director's denial of Hurlbert's request in June 2008 violates the Privileges and Immunities Clause.

Secondly, the specific allegations in paragraph 15 allege a past, not ongoing or future, injury. At the time the complaint was drafted and filed, Hurlbert had requested but had not yet been given the data. Under these circumstances, the statement in paragraph 22 of the initial complaint understandably claims, using the present tense, that VFOIA prevents Hurlbert from pursuing his common calling; however, no such circumstance existed for paragraph 36 of the amended complaint. Hurlbert did not allege that the Act would continue to interfere with his pursuit of a common calling nor indicate whether or when he expected to make another request for Virginia records. There are simply no factual allegations supporting the conclusion that Hurlbert suffered a prospective, ongoing injury that is "concrete and particularized" as to the amended complaint.

While we have acknowledged that "prospective challenges are not per se invalid," we have also explained that "the threat of injury must be 'sufficiently real and immediate to show an existing controversy.'" *Comite de Apoyo a los Trabajadores Agrícolas (CATA) v. U.S. Dep't of Labor*, 995 F.2d 510, 515 (4th Cir. 1993) (quoting *O'Shea v. Littleton*, 414 U.S. 488, 496 (1974)). "The equitable remedy is unavailable absent a showing of irreparable injury, a requirement that cannot be met where there is no showing of any real or immediate threat that the plaintiff will be wronged again—a 'likelihood of substantial and immediate irreparable injury.'" *City of L.A. v. Lyons*, 461 U.S. 95, 111 (1983)(quoting *O'Shea*, 414 U.S. at 502).

At the time Hurlbert filed his initial complaint he may have had standing to sue the Director based on the allegations pled concerning the denial of his June 2008 VFOIA request, but he failed to seek compensatory damages flowing from that denial. Once the Director provided him with the data he sought, Hurlbert failed to plead any additional facts in his amended complaint indicating that he was likely to make additional requests for such information in the immediate future. He failed to do this even though he was aware that the Director had challenged his standing to sue. Indeed, the allegations pertaining to Hurlbert in the amended complaint mirrored those set forth in his initial complaint. As a result, I would find, contrary to the majority's holding with respect to Hurlbert, that inferring an ongoing injury from the single sentence in paragraph 36 is simply too "speculative and conjectural."

Accordingly, I respectfully dissent from section III(B)(2) of the majority opinion.

# **OPPOSITION BRIEF**

**In The  
Supreme Court of the United States**

---

**MARK J. McBURNEY and ROGER W. HURLBERT,**  
*Petitioners,*

v.

**NATHANIEL L. YOUNG, JR., in his Official  
Capacity as DEPUTY COMMISSIONER AND  
DIRECTOR, DIVISION OF CHILD SUPPORT  
ENFORCEMENT, COMMONWEALTH OF  
VIRGINIA, and THOMAS C. LITTLE, DIRECTOR,  
REAL ESTATE ASSESSMENT DIVISION,  
HENRICO COUNTY, VIRGINIA,**

*Respondents.*

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**On Petition For A Writ Of Certiorari  
To The United States Court Of Appeals  
For The Fourth Circuit**

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**BRIEF IN OPPOSITION TO THE  
PETITION FOR A WRIT OF CERTIORARI**

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August 29, 2012



## **COUNTER-STATEMENT OF QUESTIONS PRESENTED**

Is the statutory right to have a state official identify and produce a state's public records upon request of a state resident a privilege or immunity protected by Article IV?

Is a law authorizing state officials to provide citizens of a state the state's public records upon request, but providing no similar access to non-citizens, subject to tier-one scrutiny under this Court's dormant Commerce Clause jurisprudence?

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## **BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI**

Virginia Attorney General Kenneth T. Cuccinelli, II, on behalf of respondents Nathaniel Young, Jr., Deputy Commissioner and Director, Division of Child Support Enforcement, Commonwealth of Virginia, and Thomas C. Little, Real Estate Assessment Division, Henrico County, Commonwealth of Virginia, submits this Brief in Opposition.<sup>1</sup>

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### **INTRODUCTION**

Although “[t]he Citizens of each State [are] entitled to all Privileges and Immunities of Citizens in the Several States,” the United States Court of Appeals for the Fourth Circuit correctly concluded that the alleged right denied petitioners Mark J. McBurney and Roger W. Hurlbert—to have Virginia officials copy and forward Virginia public records to them—was not a privilege or immunity protected by Article IV of the United States Constitution. No Court of Appeals, or any other court it would appear, has held that a non-resident is entitled to commandeer another state’s officials into providing them copies of state public documents responsive to a non-resident’s request where the documents are

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<sup>1</sup> On July 30, 2012, the Office of the Clerk of this Court requested the filing of a Brief in Opposition on or before August 29.

sought to obtain "information of a personal import." (App. at 19a.) Nor do petitioners present a plausible case for recognizing what are, in effect, a right to pre-litigation discovery against another state (McBurney) and a right to be free from residence-based limitations on a government service where that limitation incidentally burdens a non-resident's means of pursuing his economic interests (Hurlbert). Were the Court to break this new ground, and move the long-established landmarks, it would throw into confusion the States' long-established authority to confer certain "[s]pecial privileges" upon their citizens, and not others. *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1868). See, e.g., *Baldwin v. Fish & Game Comm'n of Montana*, 436 U.S. 371, 383 (1978). Moreover, the Fourth Circuit unremarkably and rightly held that a state law limiting Freedom of Information Act (FOIA) rights to the citizens of that state is not a regulation of interstate commerce at all, and, even if it were, that the Commonwealth by acting as a market participant is exempt from first-tier scrutiny under this Court's dormant Commerce Clause jurisprudence. Because no deep or mature circuit split exists and because the Fourth Circuit's decision is in harmony with the decisions of this Court, the Petition for Appeal should be denied.



### STATEMENT OF THE CASE

In 1968, the General Assembly of the Commonwealth of Virginia enacted the Virginia



Freedom of Information Act. See 1968 Va. Acts 479. The purpose of the enactment was then, and remains, "ensur[ing] the people of the Commonwealth ready access to public records in the custody of a public body or its officers and employees, and free entry to meetings of public bodies wherein the business of the people is being conducted." Va. Code Ann. § 2.2-3700(B); see 1968 Va. Acts 479. For "[t]he affairs of government are not intended to be conducted in an atmosphere of secrecy since at all times the public is to be the beneficiary of any action taken at any level of government." Va. Code Ann. § 2.2-3700(B).

As adopted, the VFOIA provided that public records would be made available upon request to the "citizens of this State," as well as "representatives of newspapers published in this State," and "representatives of radio and television stations located in this State." 1968 Va. Acts 479. At no time has this right of access extended to non-residents, other than those specified. In its present form, the VFOIA provides, in pertinent part, that

[e]xcept as otherwise specifically provided by law, all public records shall be open to inspection and copying by *any citizens of the Commonwealth* during the regular office hours of the custodian of such records. Access to such records shall not be denied to citizens of the Commonwealth, representatives of newspapers and magazines with circulation in the Commonwealth, and representatives of radio and television stations broadcasting in or into the Commonwealth.

Va. Code Ann. § 2.2-3704(A) (emphasis added). The relevant portion for purposes of this petition, Virginia's citizen limitation, is mirrored by the laws of several other states. *See, e.g.*, Ark. Code Ann. 25-19-105(a)(1)(A), (a)(2)(A), (d)(1); N.H. Rev. Stat. Ann. § 91-A:4(I); Tenn. Code Ann. § 10-7-503(a)(2)(A) & (f). The Virginia law authorizes "[a] public body" to impose only "reasonable charges not to exceed its actual cost incurred in accessing, duplicating, supplying, or searching for the requested records," and prohibits such bodies from "impos[ing] any extraneous, intermediary or surplus fees or expenses to recoup the general costs associated with creating or maintaining records or transacting the general business of the public body." Va. Code Ann. § 2.2-3704(F). Accordingly, a significant portion of the costs associated with provision of public records is borne by the taxpayers of the Commonwealth, not by the requesters of public records.

Petitioners have each sought certain Virginia "public records," Va. Code Ann. § 2.2-3701, that they deem useful to their personal interests. In the case of McBurney, a Rhode Island citizen, he filed two requests with Virginia's Division of Child Support Enforcement (DCSE), seeking documents relevant to his claim for child support payments. (App. at 7a, 30a.) McBurney requested "'all emails, notes, files, memos, reports, policies, and opinions'" in DCSE's custody regarding him, his son, and his former wife and "'all documents regarding his application for child support'" and how similar applications are

handled. (App. at 7a, 54a.) These requests were filed in response to DCSE's error in filing a petition for child support requested by McBurney that resulted in his not obtaining child support payments for nine months. McBurney specifically pled that the requests were made to obtain information "that would assist him in determining how his petition was processed and why the delay occurred." (App. at 7a-8a, 30a.) Although both requests were denied in part on the ground that McBurney was not a Virginia citizen, DCSE "did . . . inform McBurney that he could obtain the requested information" under another Virginia statute. (App. at 8a, 30a.) Ultimately, McBurney "acquired most of the requested information" under that statute, "over eighty requested documents." (App. at 8a, 30a, 54a.)

Petitioner Hurlbert, a citizen of California who has made a business of obtaining "real estate tax assessment records for his clients from state agencies across the United States" utilizing state FOIA laws, filed a request in June of 2008, seeking such records for certain parcels located in Henrico County, Virginia. (App. at 8a, 31a.) Although Hurlbert ultimately received the requested information, as he had on seventeen prior occasions, the Henrico County Real Estate Assessor's Office initially denied the June 2008 request on the ground that he is not a citizen of the Commonwealth. (App. at 8a, 31a.)

Petitioners filed suit under 42 U.S.C. § 1983 in the United States District Court for the Eastern District of Virginia, seeking declaratory and injunctive

relief. (App. at 8a.) The suit claimed that VFOIA's "citizens-only provision" violates the Privileges and Immunities Clause by denying "them the 'right to participate in Virginia's governmental and political processes' by barring them 'from obtaining information from Virginia's government.'" (App. at 8a-9a.) Petitioner Hurlbert also claimed that VFOIA violated the Commerce Clause's negative command by excluding him, as a non-resident, "'from pursuing any business stemming from Virginia public records on substantially equal terms with Virginia citizens.'" (App. at 9a.)

Once it was found that McBurney and Hurlbert possessed standing to assert their claims, the parties filed cross-motions for summary judgment on the merits. *McBurney v. Cuccinelli*, 780 F. Supp. 2d 439, 453 (E.D. Va. 2011). (App. at 29a.) The district court held that the record failed to identify any fundamental right protected by the Privileges and Immunities Clause. *Id.* at 448-49. (App. at 36a-44a.) Moreover, it concluded that the law was not a "[d]iscriminatory restriction on commerce" and did not otherwise violate the dormant Commerce Clause because, "[w]hile the law may have some incidental impact on out-of-state business, [its] goal is not to favor Virginia business over non-Virginia business." *Id.* at 452-53. (App. at 47a, 49a.)

A unanimous panel of the United States Court of Appeals for the Fourth Circuit agreed. *McBurney v. Young*, 667 F.3d 454, 470 (4th Cir. 2012). (App. at 28a.) Applying this Court's "two-step inquiry" for

Privileges and Immunities claims, *id.* at 462 (citing *Supreme Court of Virginia v. Friedman*, 487 U.S. 59, 64 (1988)) (App. at 12a-13a), the Court of Appeals “conclud[ed] that the [law] does not infringe on any of the Appellants’ fundamental rights or privileges protected by the Privileges and Immunities Clause.” *Id.* at 467. (App. at 23a.) Consequently, the Fourth Circuit did not proceed to the second step of evaluating the state interest advanced by the citizens-only provision. *Id.* (App. at 23a.) The court of appeals also rejected petitioner Hurlbert’s dormant Commerce Clause claim, concluding that the district court properly applied “[t]he second tier of dormant Commerce Clause analysis[,] the *Pike* test,” rather than the first tier, because the law “does not facially, or in its effect, discriminate against interstate commerce or out-of-state economic interests,” but “is wholly silent as to commerce or economic interests, both in and out of Virginia.” *Id.* at 468-69 (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970)). (App. at 25a-26a.) The court also noted that Hurlbert had not appealed and thus had “waived any challenge to” “how the [district] court undertook the *Pike* analysis.” *Id.* at 469-70. (App. at 27a.)

The heart of this petition, and of the Fourth Circuit’s analysis, is that court’s treatment of petitioners’ Privileges and Immunities claims. In holding that petitioners had failed to identify any protected privilege that was being infringed, the court of appeals recognized that “states are permitted to distinguish between residents and nonresidents so



long as those distinctions do not ‘hinder the formation, the purpose, or the development of a single Union of those States’” by abridging “privileges and immunities bearing upon the vitality of the Nation as a single entity.” *Id.* at 462-63 (emphasis and internal quotation marks omitted) (quoting *Baldwin*, 436 U.S. at 383). (App. at 13a-14a.) The Court observed that petitioners asserted a number of “rights,” but that only two of them touched on fundamental rights as identified by this Court: “the right to access courts and the right to pursue a common calling.” *Id.* at 463. (App. at 14a.) The former, asserted only by McBurney, was rejected because the right claimed “is something much different than any court access right previously recognized,” because the law does not “speak[] to the [petitioners’] ability to file a proceeding in any court or otherwise enforce a legal right within Virginia” and the “Privileges and Immunities Clause is not a mechanism for pre-lawsuit discovery.” *Id.* at 463 n.3, 467. (App. at 14a n.3, 22a-23a.)

In rejecting petitioner Hurlbert’s unique Privileges and Immunities claim—that the law abridged his right to pursue a common calling in Virginia on “terms of substantial equality” with Virginia residents—the Fourth Circuit again concluded that the law just does not regulate in any sense that implicates the Privileges and Immunities Clause. *Id.* at 464-65. (App. at 16a-18a.) Nothing prohibits Hurlbert from pursuing a common calling. The court reasoned that the law “limits one method by which Hurlbert may carry out his business and

thus has an ‘incidental effect’ on his common calling in Virginia,” but “does not implicate Hurlbert’s right to pursue a common calling.” *Id.* at 465. (App. at 18a.)

The Fourth Circuit held that the other alleged privileges and immunities that petitioners jointly asserted, namely the right to “‘equal access to information’” along with their “‘ability to pursue their economic interests on equal footing,’” are not fundamental rights protected by the Privileges and Immunities Clause at all. *Id.* at 463, 465-67 (App. at 14a, 23a.) As for the right to pursue their economic interests on equal footing, the Fourth Circuit explained that no case had identified such a “novel generic right,” and held that, insofar as this right is protected by the Privileges and Immunities Clause, it is protected under the common calling and access to courts principles, neither of which were offended by the Virginia law. *Id.* at 467 (citation omitted). (App. at 23a.)

The Fourth Circuit avoided a meaningful circuit split by distinguishing *Lee v. Minner*, 458 F.3d 194 (3d Cir. 2006), observing “the specific right that Lee identified is not one previously recognized by the Supreme Court, or any other court, as an activity within the scope of the Privileges and Immunities Clause.” *McBurney*, 667 F.3d at 465. (App. at 19a.) Moreover, *Lee* only recognized this right of equal access to information for non-residents seeking “‘to engage in the political process with regard to matters of both national political and economic importance,’” that is, access to information sought “to advance the

interests of other citizens or the nation as a whole, or that is of political or economic importance." *Id.* (quoting *Lee*, 454 F.3d at 199). (App. at 19a.) Because petitioners, on the other hand, sought "information of [only] personal import"—McBurney to determine whether he had a legal claim against a Virginia agency and Hurlbert to fulfill his private contract for hire—the court of appeals held their claims of entitlement to information not to be embraced in "*Lee's* rationale." *Id.* at 465-66. (App. at 19a-20a.) The Fourth Circuit also declined to read into the Privileges and Immunities Clause "a 'broad right of access to information'" that is "grounded in 'the First Amendment's guarantees of free speech and free press,'" reasoning that the two clauses protect different rights. *Id.* at 466. (App. at 20a-21a.)

Finally, the Fourth Circuit rejected the additional right petitioner McBurney appended to the "right to equal access to information" claim—"his '[right] to advocate for his interests and the interests of others similarly situated'"—for the same reasons identified for rejecting the equal access to information and equal access to courts claims and also because petitioner McBurney had plead that he was requesting information "on his own behalf" "to advance *his own* interests," not those of others. *Id.* at 463, 466-67. (App. at 14a, 21a-22a.)

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## SUMMARY OF ARGUMENT

The Fourth Circuit's Privileges and Immunities holdings in this case do not conflict with the holding in *Lee v. Minner*, nor with any decision of this Court. Nor is there any support in the history of the Privileges and Immunities Clause or in this Court's precedents for recognizing a positive right to have state officials provide a non-resident with that state's public records on equal terms with a resident. Recognition of such a "privilege" would cast a cloud of uncertainty over the constitutionality of all state and local government services that are tied to state or local residency-status. Finally, the Virginia law being challenged does not regulate commerce at all, but only Virginia's provision of its own government services. And even if it did, the Commonwealth of Virginia, as a participant in the market for state public records, is entitled to choose with whom and on what terms it deals.

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## REASONS FOR DENYING THE PETITION

### I. THE FOURTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH THE THIRD CIRCUIT'S DECISION IN *LEE*.

Contrary to petitioners' assertions, the Third Circuit recognized no right that the Fourth Circuit rejected, but recognized only a non-citizen's right to obtain public documents that are sought in order to engage in the political process on matters of national

political and economic importance. In *Lee v. Minner*, Lee, a writer who “regularly publishe[d] articles on [alleged predatory practices of banks and other financial services companies and on the regulation of these entities] in print media and online sources,” “requested records . . . regarding Delaware’s decision to join a nationwide settlement . . . resolving an investigation into [a company’s] deceptive lending practices.” 458 F.3d at 195-196. Lee’s request was denied on the ground that he was not a citizen of Delaware, and thus not entitled under Delaware law to obtain records under its FOIA law, which, unlike Virginia’s, provided no right to public records for members of the media. *Id.* at 195-96 n.1; *cf.* Va. Code Ann. § 2.2-3704(A). Lee asserted that this restriction infringed “his right to pursue his ‘common calling’ as a journalist and . . . his right to ‘engage in the political process with regard to matters of political and economic importance.’” *Id.* at 198. The Third Circuit elected not to resolve the plaintiff’s common calling claim, but instead concluded that “the right to ‘engage in the political process with regard to matters of national political and economic importance’ . . . is protected under the Privileges and Immunities Clause.” *Id.* at 199.

The Third Circuit reasoned that “political advocacy regarding matters of national interest or interests common between the states plays an important role in furthering a ‘vital national economy’ and ‘vindicat[ing] individual and societal rights.’” *Id.* at 200 (quoting *Tolchin v. Supreme Court of New*



*Jersey*, 111 F.3d 1099, 1111 (3d Cir. 1997)). And “[e]ffective advocacy and participation in the political process . . . require access to information.” *Id.* The Third Circuit thus concluded that “access to public records is a right protected by the Privileges and Immunities Clause.” *Id.* The Court concluded that the burden on this right was substantial “[b]ecause noncitizens are precluded from obtaining any FOIA information, at any time, for any reason,” *id.* and that the “citizens-only provision” bears little—if any—relationship to” the “‘substantial reason’” offered for it: “to ‘define the political community and strengthen the bond between citizens and their government.’” *Id.* at 200-01 (citation omitted). Accordingly, the Third Circuit held that Delaware’s citizens-only provision violates “the Privileges and Immunities Clause of Article IV.” *Id.* at 201.

Petitioners’ claimed rights are a far cry from those asserted in *Lee*. The Third Circuit decision involved denial to a non-resident journalist of access to public records involving a nationwide settlement with a financial institution; the Fourth Circuit decision involved denial of records relating to the child-support claims of a non-resident father considering whether to pursue claims against a state agency and of tax assessment records relating to certain Virginia parcels sought by a purveyor for-hire of land records. The public records that petitioners were denied are not related to any matter of general or national concern, but are only of private legal and economic interest to the requesters, and were not

sought to inform the public, pursue any public interest, or engage in the political process. See *McBurney*, 667 F.3d at 465-66. (App. at 21a-22a.) In sum, the Third and Fourth Circuits have not both considered a claim that the “right to ‘engage in the political process with regard to matters of political and economic importance’” was denied, and thus are not, and could not be, in conflict as to its existence. *Lee*, 458 F.3d at 198. Because of the factual distinctions drawn by the Fourth Circuit, this case is not a good vehicle for considering *Lee*.

Since *Lee*, no court has given its holding that the Privileges and Immunities Clause’s prohibits citizenship discrimination on matters of access to public records the broad reading urged by petitioners nor has any court relied upon its holding to strike down a state FOIA restriction. In fact, the only decision to consider *Lee* in the context of such a privileges and immunities challenge found *Lee* and *McBurney* to be in harmony. See *Jones v. City of Memphis*, No. 10-2776, \_\_\_ F. Supp. 2d \_\_\_, 2012 U.S. Dist. LEXIS 51026, at \*22-23, \*38; 2012 WL 1228181, at \*7-8, \*13 (W.D. Tenn. Apr. 11, 2012) (following *McBurney* to hold that the plaintiff had failed to allege infringement of the fundamental right identified by *Lee*). In sum, there is no reason to believe that any conflict exists between the decisions of the Third and Fourth Circuits, or that the decisions will undermine the uniform application of the Privileges and Immunities Clause. Nor is there any other reason to grant a petition for writ of certiorari.

**II. THE FOURTH CIRCUIT CORRECTLY CONCLUDED THAT THERE IS NO JURISPRUDENTIAL SUPPORT FOR THE AHISTORICAL CLAIM THAT ACCESS TO STATE PUBLIC RECORDS IS A PRIVILEGE OR IMMUNITY OF STATE CITIZENSHIP.**

On the merits of the privileges and immunities claims, the Fourth Circuit's decision was right as a matter of historical understanding, Supreme Court precedent, and sensible policy.

**A. The Historical Record Does Not Support Petitioners' Novel Claim that Not Being Afforded, on Request, Another State's Public Records Violates Their Privileges or Immunities.**

Article IV's protection of Privileges and Immunities has its source in Article IV of the Articles of Confederation. *Baldwin*, 436 U.S. at 379 & n.17. The Articles provided:

The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all

the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively, provided that such restrictions shall not extend so far as to prevent the removal of property imported into any State, to any other State, of which the owner is an inhabitant; provided also that no imposition, duties or restrictions shall be laid by any State, on the property of the United States, or either of them.

Articles of Confederation, art. IV, cl. 1. In the place of this rather perplexing provision, see THE FEDERALIST No. 42, at 285-86 (James Madison) (J. Cooke ed., 1961), the Constitution provides the concise statement that "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const. art. IV, § 2, cl. 1.

The agreed purpose of this provision was to remove from non-residents "the disabilities of alienage," *Baldwin*, 436 U.S. at 380-81 & n.19 (quoting *Paul*, 75 U.S. (8 Wall.) at 180), a set of legal restrictions known to the common law and imposed upon foreign citizens by virtue of their foreign status. 2 William Blackstone, *Blackstone's Commentaries on the Laws of England* 371-74 (photo. reprint) (St. George Tucker ed., 1803) (listing prohibitions on ownership of real property, inherited or transmitting an inheritance, working in certain trades and imposition of special commercial taxes). The first federal case construing the rights protected by the Privileges and

Immunities Clause, *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1825) (Case No. 3,230), described the rights protected as being “confined” to “those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign.” *Id.* at 552. However, the provision does not require a state “to extend to the citizens of all the other states the same advantages as are secured to their own citizens” especially with regard to “regulating the use of the common property of the citizens of such state.” *Id.*

Lack of access to public records upon request was not a disability of alienage under the common law, nor has the right of such access, “at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign,” as neither the states nor the federal government provided citizens general access to public records until the last third of the twentieth century. *Id.*; see 5 U.S.C. § 552; Pub. L. No. 89-554 (Sept. 6, 1966); 1967 Ark. Acts 93; 1957 Tenn. Pub. Acts 285; 1968 Va. Acts 479; cf. David C. Vladeck, *Access and Dissemination of Information: Information Access—Surveying the Current Legal Landscape of Federal Right-to-Know Laws*, 86 Tex. L. Rev. 1787, 1795-96 (2008) (describing the federal government’s enactment of its own freedom of information laws in 1966 as “truly an experiment in



open government” and noting that, “[a]t the time of its passage, only two countries—Sweden and Finland—had open record laws resembling” the federal FOIA). To the extent there was a common law right to physically inspect and copy public records, *see Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 597 n.7 (1978), it is not being denied here, as McBurney can obtain the information he seeks on the internet and Hurlbert is free to travel to Henrico County and examine and copy any tax assessment records.

Finally, the claimed right to have government officials identify and provide responsive public records upon request is not embraced in the list of privileges and immunities identified by Justice Washington in *Corfield*: the “right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal.” 6 F. Cas. at 552; *see also, Ward v. Maryland*, 79 U.S. (12 Wall.) 418, 430 (1871) (providing a similar listing of rights). Recognition of an Article IV privilege to demand public records would require the Court to take leave of any historical understanding of what counts as “fundamental” for purposes of the Privileges and Immunities Clause.

**B. Petitioners' Alleged Privilege, to Commandeer Other State's Officials to Provide Public Records at or Below Cost, Is Not Sufficiently Basic to the Livelihood of the Nation or Fundamental Under This Court's Precedents.**

Furthermore, the right asserted finds no support in this Court's case law. Despite acknowledging a shifting of the theoretical foundation for evaluating whether a claimed right was in fact a privilege or immunity, *Baldwin*, 436 U.S. at 382-83, this Court's precedents have consistently hewed to the view that, in some circumstances, "state citizenship or residency may . . . be used by a State to distinguish among persons." *Id.* at 383. "Some distinctions between residents and nonresidents merely reflect the fact that this is a Nation composed of individual States, and are permitted; other distinctions are prohibited because they hinder the formation, the purpose, or the development of a single Union of those States." *Id.*; see *Paul*, 75 U.S. (8 Wall.) at 180 ("Special privileges enjoyed by citizens in their own States are not secured in other States by this provision."). The Court has also consistently maintained that not just any benefit is a privilege or immunity, but that "[o]nly with respect to those 'privileges' and 'immunities' bearing upon the vitality of the Nation as a single entity," or that are "basic to the maintenance or well-being of the Union," or "the livelihood of the Nation," "must the State treat all citizens, resident and nonresident, equally." *Baldwin*, 436 U.S. at 383,

388; see *Corfield*, 6 F. Cas. at 552 (opining that the protected rights were limited to “those privileges and immunities which are, in their nature, fundamental”). And the protected activities have notably been commercial in nature, as “the Privileges and Immunities Clause was intended to create a national economic union.” *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 279-80 (1985).

Accordingly, the Court has never held that a state’s restriction on a non-citizen’s political rights violated the Privileges and Immunities Clause. *Baldwin*, 436 U.S. at 383 (citing *Dunn v. Blumstein*, 405 U.S. 330 (1972) (citizens-only voting) and *Kanapaux v. Ellisor*, 419 U.S. 891 (1974) (citizens-only elected officials)). Nor has it held that any of the ‘personal’ rights enumerated in the first Eight Amendments were protected by the Privileges and Immunities Clause. See 2 Donald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law* § 12.7, at 335 (4th ed. 2007) (“[W]hether a right is sufficiently fundamental to be protected by the [Privileges and Immunities] clause should not be confused with a determination of whether an activity constitutes a fundamental right so as to require strict judicial scrutiny under the due process and equal protection clauses.”). And even if the Privileges and Immunities Clause were thought to selectively incorporate protection for political advocacy, it would be incongruous to hold that the Privileges and Immunities Clause protects a non-resident’s right to obtain information from state government on equal footing as residents when the First Amendment does not guarantee that right to

anyone, even members of the press. See *Houchins v. KQED, Inc.*, 438 U.S. 1, 14 (1978) (plurality opinion) (“There is no constitutional right to have access to particular government information, or to require openness from the bureaucracy. . . . The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act.” (quoting Potter Stewart, *Or of the Press*, 26 Hastings L. J. 631, 636 (1975))).

Even where a recognized right has been burdened by non-provision of some state government service, this Court has accepted those restrictions provided the right itself is not destroyed. For a State need not “always apply all its laws or all its services equally to anyone, resident or nonresident, who may request it so to do.” *Baldwin*, 436 U.S. at 383 (citing, e.g., *Canadian N. Ry. Co. v. Eggen*, 252 U.S. 553, 560-62 (1920)); see also *Martinez v. Bynum*, 461 U.S. 321, 328 (1983) (holding that “[a] bona fide residence requirement . . . furthers the substantial state interest in assuring that services provided for its residents are enjoyed only by residents” and thus that local public schools need not offer the same tuition rates to non-resident students as resident students); *Starns v. Malkerson*, 401 U.S. 985 (1971) (summarily affirming bona fide residence requirement for in-state tuition rate at state university).

Recurring to this Court’s precedents regarding the Privileges and Immunities Clause’s protections, it is apparent that the Fourth Circuit faithfully applied settled law. For there is no protected ‘privilege’ to every means by which a citizen of a state may

“secur[e] any number of personal, economic, and political interests.” (Pet. at 15.) Rather, the recognized privileges and immunities are few and defined: the right to travel interstate, *Shapiro v. Thompson*, 394 U.S. 618, 629-30 (1969); to pursue a “common calling within the State” free from “unreasonable burdens” not borne by residents; to “own[] and dispos[e] of privately held property within the State”; to “access . . . the courts of the State,” *Baldwin*, 436 U.S. at 383; and to procure on substantially equal terms “the general medical care available within [a State.]” *Doe v. Bolton*, 410 U.S. 179, 200 (1973). While these rights may prove useful in “securing any number of personal, economic, and political interests,” it does not follow, nor has it ever been previously suggested, that any means provided by a State to aid its residents in the pursuit of those interests must be afforded to non-residents. And even where the protected privilege is plainly restricted, the restriction will be invalidated only if it “is not closely related to the advancement of a substantial state interest,” *Friedman*, 487 U.S. at 65, a question neither the district court nor Fourth Circuit had occasion to reach.

Besides asserting highly abstract rights never recognized by this Court or any other, petitioners also claim that the Virginia law violates well-recognized rights, such as the right to access the courts and to pursue a common calling. However, it is plain that the Fourth Circuit properly held that these were not infringed. The right to access the courts of the State,



"to sue and defend in the courts," *Chambers v. Baltimore & Ohio Ry. Co.*, 207 U.S. 142, 148 (1907), is precisely that: the right "to institute actions," *Cole v. Cunningham*, 133 U.S. 107, 114 (1890); or "to maintain actions in the courts of the State," *Ward*, 79 U.S. (12 Wall.), 79 U.S. (12 Wall.) at 430, and to do so "upon terms which in themselves are reasonable and adequate for the enforcing of any rights he may have, even though they may not be technically and precisely the same in extent as those accorded to resident citizens." *Eggen*, 252 U.S. at 562. By not providing, upon the petitioners' request, certain Virginia public records, the Commonwealth has not "close[d] the doors of the courts" to petitioners, *Chambers*, 207 U.S. at 157 (Harlan, J., dissenting), for they are free to bring a suit under the same terms applicable to citizens. Petitioners' apparent desire to use FOIA requests as a means of pre-suit discovery does not make that statute part and parcel of the Virginia court system for enforcing one's rights.

As for petitioner Hurlbert's common calling claim, even assuming that providing to clients desired state government records related to real estate is a common calling, the Virginia law is not a professional or commercial regulation at all, but "a regulation of the internal affairs of a State." *Blake v. McClung*, 172 U.S. 239, 256 (1898). Furthermore, it is unquestioned that Hurlbert is free to ply his trade in Virginia, personally inspecting and copying real estate records as well as buying and selling such records in Virginia. The Virginia residency limitation simply prevents

him from requiring Virginia officials to employ themselves in making profitable his business model by rendering nugatory the costs inherent in Hurlbert's decision to live elsewhere.

In sum, as was said of "Montana elk," general "[e]quality in access to [common property of a state] is not basic to the maintenance and well-being of the Union." *Baldwin*, 436 U.S. at 388. And recognition of such a novel right—to have the government provide information on request—would invite a flood of litigation as to its contours and inspire suits asserting rights to every other state-provided means of "securing any number of personal, economic, and political interests" that are presently limited to its citizenry.

**C. Petitioners' Claimed Privilege Would Undermine Our Federal System and Practically Prohibit All States from Providing a Wide Variety of Services That They Currently Afford Exclusively to Their Citizens.**

The benefits that States provide, be it in government loans, subsidies, or services, exclusively to their citizens to enable them to more effectively and fully pursue their legal, political, and economic interests are many. Accepting petitioners' understanding of the scope of the Privileges and Immunities protections would call into question that ability and, by virtue of each state's limited resources,

the continued availability of the benefit to anyone. Granting review would begin a lengthy process of defining a novel right without defined limits in a way that undermines interests of clarity and uniformity.

**III. THE FOURTH CIRCUIT CORRECTLY CONCLUDED THAT VIRGINIA'S FOIA STATUTE DOES NOT DISCRIMINATE AGAINST INTERSTATE COMMERCE AND, EVEN IF IT DID, IT SURVIVES DORMANT COMMERCE CLAUSE REVIEW BECAUSE THE STATE, IN PROVIDING PUBLIC RECORDS, IS ACTING AS A MARKET PARTICIPANT.**

Ignoring this Court's case law on dormant Commerce Clause review of state and local provision of governmental services, petitioners urge this Court to conclude that the Fourth Circuit erred in not applying "the 'virtually per se rule of invalidity'" to the citizenship limitation. (Pet. at 22.) Petitioners claim that the provision "discriminates against out-of-state economic interests *both* facially and in effect." (Pet. at 23.) Because the citizenship limitation is not a regulation regulating commerce at all, the Fourth Circuit correctly held that it does not run afoul of the dormant Commerce Clause. Alternatively, even if it is viewed as a regulation of commerce, the state, in limiting the right to procure Virginia public records to citizens (and members of the media) would be acting as a market participant, and thus

is utterly exempt from dormant Commerce Clause scrutiny.

The “negative implication” of the Commerce Clause, *Dep’t of Revenue of Kentucky v. Davis*, 553 U.S. 328, 337 (2008), prohibits States from “erect[ing] barriers to interstate trade,” *Dennis v. Higgins*, 498 U.S. 439, 446 (1991) (internal quotation marks omitted), so as to prevent “economic Balkanization,” while allowing for “a degree of local autonomy.” *Davis*, 553 U.S. at 338. This Court applies a “‘virtually *per se* rule of invalidity’” to “‘regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.’” *Wyoming v. Oklahoma*, 502 U.S. 437, 454 (1992) (quoting *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978) and *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 273-74 (1988), respectively); accord *Davis*, 553 U.S. at 338. Plainly discriminatory laws are upheld only if “the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism.” *Wyoming*, 502 U.S. at 454. In nearly all cases raising dormant Commerce Clause challenges, “[t]he crucial inquiry . . . must be directed to determining whether [the challenged statute] is basically a protectionist measure, or whether it can fairly be viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental.” *Philadelphia*, 437 U.S. at 624. That is especially so here because petitioners did not

challenge the district court's finding that the law survived *Pike* scrutiny. *See Pike*, 397 U.S. at 142.

As this Court has recently reiterated, a distinction affecting interstate commerce is only impermissible if it is "discrimination for the forbidden purpose" of economic protectionism. *Davis*, 553 U.S. at 338. And the effect of the law must be to impede the flow of interstate commerce generally, for the "Commerce Clause does not protect 'the particular structure or methods of operation' of a market," *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 344 (2007) (quoting *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127 (1978)), or "particular interstate firms." *Exxon Corp.*, 437 U.S. at 127-28. The Court has repeatedly cautioned that state and local laws which, in regulating the provision of state and local government services, also incidentally burden interstate commerce do not thereby discriminate against interstate commerce. *See Davis*, 553 U.S. at 339-41 (declaring that "a government function is not susceptible to standard dormant Commerce Clause scrutiny owing to its likely motivation by legitimate objectives distinct from the simple economic protectionism the Clause abhors"). An animating concern for this deferential approach is that the alternative "would lead to unprecedented and unbounded interference by the courts with state and local government." *Id.* (quoting *United Haulers*, 550 U.S. at 343).



Independently, an exception to the Commerce Clause applies in favor of states acting as "market participants," not "market regulators." *Davis*, 553 U.S. at 339; see, e.g., *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976). In such a capacity, States may "exercis[e] the right to favor its own citizens over others" in the purchase or sale of goods or services. *Hughes*, 426 U.S. at 810; accord *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 685 (1999); see, e.g., *Reeves, Inc. v. Stake*, 447 U.S. 429, 430-33, 438-39 n.12, 446-47 (1980) (noting that States, when acting as market participants, "enjoy[] the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases" (quoting *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 127 (1940))) and holding that South Dakota's "citizens-first" policy on the sale of cement produced by a state-owned and -operated cement plant was protected from dormant Commerce Clause invalidation by the "exemption for marketplace participation" by states). Flatly, "[w]hen a state or local government enters the market as a participant it is not subject to the restraints of the Commerce Clause." See *Davis*, 553 U.S. at 339 (quoting *White v. Massachusetts Council of Constr. Emp'rs, Inc.*, 460 U.S. 204, 208 (1983)); see also *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 93 (1984).

The stated purpose of the Virginia law is to "ensure[] the people of the Commonwealth ready access to public records in the custody of a public

body or its officers and employees, and free entry to meetings of public bodies wherein the business of the people is being conducted. The affairs of government are not intended to be conducted in an atmosphere of secrecy since at all times the public is to be the beneficiary of any action taken at any level of government.” Va. Code Ann. § 2.2-3700(B). And the challenged section plainly is designed to further this purpose by not only allowing citizens of the Commonwealth broad access to public records created by their officials, but also to “representatives of newspapers and magazines with circulation in the Commonwealth, and representatives of radio and television stations broadcasting in or into the Commonwealth.” Va. Code Ann. § 2.2-3704(A). That section is part of the Administration of State Government subtitle, the Transaction of Public Business part, and a part of the much larger Chapter entitled Virginia Freedom of Information Act, which sets out in painstaking detail the type of information available and protected from disclosure under the act and the process for obtaining that information, including provisions for judicial enforcement. *See* Va. Code Ann. § 2.2-3700 through -3714.

As the Fourth Circuit held, the plain purpose of this scheme is not to discriminatorily burden out-of-state economic interests and favor in-state economic interests, but instead “reflect[s] the essential and patently unobjectionable purpose of state government—to serve the citizens of the State.” *Reeves, Inc.*, 447 U.S. at 442. Thus, even if the public records

themselves, like the drivers' information in *Reno v. Condon*, 528 U.S. 141, 148 (2000), are considered to be "article[s] of commerce," although not widely sold in commerce, the regulation at issue does not discriminate against interstate commerce as such. Rather, it merely seeks to provide Virginia citizens (and others through the media) information about their government and, at the same time, prevent state offices from becoming public information desks that occasionally serve the citizens of the Commonwealth.

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## CONCLUSION

For reasons stated above, the Petition for a Writ of Certiorari should be DENIED.

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August 29, 2012

# **REPLY BRIEF**

No. 12-17

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IN THE  
**Supreme Court of the United States**

---

MARK J. MCBURNEY and ROGER W. HURLBERT,  
*Petitioners,*

v.

NATHANIEL YOUNG, JR., Deputy Commissioner and  
Director, Division of Child Support Enforcement,  
Commonwealth of Virginia and THOMAS C. LITTLE,  
Director, Real Estate Assessment Division, Henrico County,  
Commonwealth of Virginia,  
*Respondents.*

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On Petition for a Writ of Certiorari to the  
United States Court of Appeals for the Fourth Circuit

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**PETITIONERS' REPLY**

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September 2012

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## PETITIONERS' REPLY

Virginia does not deny that the question presented is important to the many businesses and individuals who obtain, sell, buy, and use public records nationwide. Nor does Virginia make any effort to justify its facial discrimination against out-of-state residents or deny that this discrimination has a distorting and anticompetitive effect on the national market for public information. That its restrictions make out-of-state businesses less “profitable” than their Virginia counterparts, in the Commonwealth’s view, is simply the “cost[] inherent in [the] decision to live elsewhere.” BIO 24. That statement speaks for itself.

Virginia opposes review on two grounds. It denies the existence of the circuit split and contends that its discrimination falls wholly beyond the reach of the Privileges and Immunities and dormant Commerce Clauses. Both contentions lack merit, and neither should stand in the way of this Court’s review.

### **I. Virginia Fails to Explain Away the Split.**

Virginia’s effort to downplay the circuit split consists largely of distinguishing the Third Circuit’s decision on its facts. But Virginia ignores the key point emphasized in the petition: The Third Circuit held that the citizens-only restriction of the Delaware Freedom of Information Act—a restriction identical to Virginia’s—is facially unconstitutional and *cannot be enforced in any circumstances*. *Lee v. Minner*, 458 F.3d 194, 200-201 (3d Cir. 2006). The court thus affirmed “an order permanently enjoining Delaware’s Attorney General from ‘refusing to honor or respond to [FOIA] requests ... on the basis of the requestor’s residency or citizenship’ and directing the Attorney General to ‘process and evaluate FOIA requests from nonresidents or noncitizens in the same

manner in which FOIA requests from citizens of Delaware are processed and evaluated.” *Id.* at 197 (quoting injunction); *id.* at 195, 202 (affirming order).

One way of testing whether a circuit split exists is to ask whether the courts in different circuits would be compelled to reach different results on the same facts. Virginia does not deny that its statute is indistinguishable from the Delaware statute invalidated in *Lee*. If this case could be filed in the Third Circuit, there is no question that the citizens-only restriction would be held unconstitutional and unenforceable under *Lee*. The Fourth Circuit, by contrast, squarely rejected the same constitutional challenge on the merits. Pet. App. 21a (holding that “[a]ccess to a state’s records simply does not ‘bear[] upon the vitality of the Nation as a single entity’ such that VFOIA’s citizens-only provision implicates the Privileges and Immunities Clause”). It therefore did not “avoid[] a meaningful circuit split,” as Virginia contends. BIO 9. Indeed, in a recent case challenging the citizens-only restriction of the Arkansas Freedom of Information Act, the Eighth Circuit acknowledged that the Third and Fourth Circuits have reached diametrically opposite conclusions on the question presented here. *See Aamodt v. City of Norfolk, Ark.*, — F.3d —, 2012 WL 2369109, at \*2 (8th Cir. June 25, 2012) (describing conflicting decisions). This is a true circuit split—and an undeniably important one.

Given this incompatibility, Virginia’s attempt to distinguish the cases on their facts fails. Virginia points out that *Lee* involved a journalist seeking records relating to Delaware’s participation in a settlement with a financial institution, while this case involves non-journalists seeking child-support and tax assessment records. That is a distinction without a difference. The Third Circuit con-



cluded that “access to public records is a right protected by the Privileges and Immunities Clause” and that Delaware’s statute burdened that right because “noncitizens are precluded from obtaining any FOIA information, at any time, for any reason.” *Lee*, 458 F.3d at 200. By its own terms, that holding does not turn on the nature of the records sought or the identity of the requester.

Nor can the Third Circuit’s holding be limited by the court’s rationale that a right of access is essential to political advocacy on a national level. Seizing on that rationale, Virginia contends that *Lee* extends “only” to “public documents that are sought in order to engage in the political process on matters of national political or economic importance.” BIO 11-12. The opinion, however, reflects no limitation based on the political purpose for which public records are sought, and it is hard to imagine how such a limitation could be administered in practice because FOIA requesters need not (and do not) state their purpose in seeking records. Moreover, a restriction of that kind would raise constitutional problems of its own. See *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2666 (2011) (discussing opinions in *L.A. Police Dep’t v. United Reporting Publ’g Corp.*, 528 U.S. 32 (1999)). In any event, if the Third Circuit had intended such a limitation, its decision to invalidate the Delaware statute on its face and affirm the permanent injunction would make no sense.

This Court “reviews judgments, not opinions.” *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). Here, the judgments of two circuits squarely conflict, that conflict has serious practical consequences, and only this Court can resolve it.

## II. Virginia's Arguments on the Merits Only Underscore the Need for this Court's Review.

Turning to the merits, Virginia seeks to defend the Fourth Circuit's decision on historical grounds. Pepper-  
ing its brief with citations to the Articles of Confedera-  
tion, the Federalist Papers, and Blackstone, Virginia  
contends that a proper "historical understanding" of the  
Privileges and Immunities Clause forecloses a constitu-  
tional challenge to the citizens-only restriction. BIO 15-  
18. Petitioners of course disagree, as did the Third Cir-  
cuit. If the Court grants the petition, there will be time  
enough to fully explore the relevant historical record.  
For present purposes, what matters is that the parties'  
disagreement over foundational principles underscores  
the need for guidance in an area of constitutional law  
that "has not often been the subject of litigation before  
this Court." *Baldwin v. Fish & Game Comm'n of Mont.*,  
436 U.S. 371, 395 (1978).

The right of access to public records, Virginia con-  
tends, falls outside the Privileges and Immunities Clause  
because it is of recent vintage and "is not embraced in  
the list of privileges and immunities identified by Justice  
Washington in *Corfield* [*v. Coryell*, 6 F. Cas. 546, 552  
(C.C. E.D. Pa. 1825)]." BIO 18. That argument is hard to  
square with the acknowledgment a few pages later that  
the Clause also protects the right "to procure on sub-  
stantially equal terms 'the general medical care available  
within a State'"—a right nowhere on Justice Washing-  
ton's list. BIO 22 (quoting *Doe v. Bolton*, 410 U.S. 179,  
200 (1973) (alteration omitted)). In truth, it has long been  
clear that *Corfield* does not define the Clause's limits.  
*See Baldwin*, 436 U.S. at 380-82 (recounting history).  
Seventy years ago, Justice Roberts explained that the  
Court had moved past Justice Washington's view that

the Clause covered only “a group of rights which, according to the jurisprudence of the day, were classed as ‘natural rights.’” *Hague v. CIO*, 307 U.S. 496, 511 (1939). Instead, the Court came to recognize that the Clause embodies a more general rule of nondiscrimination extending to rights that bear upon the Nation as a single entity. *Id.*; see *Austin v. New Hampshire*, 420 U.S. 656, 660–661 (1975) (describing the Clause as establishing “a norm of comity without specifying the particular subjects as to which citizens of one State coming within the jurisdiction of another are guaranteed equality of treatment”).

But Virginia’s argument is wrong even on its own terms. The Commonwealth ignores the argument that petitioner Hurlbert’s right to access real estate records is particularly well-grounded in history. See Pet. 16. On even the most cramped account, the Privileges and Immunities Clause protects the right “to take, hold and dispose of property, either real or personal.” *Corfield*, 6 F. Cas. at 552. Other rights—like the right to court access—were protected by the Clause *because* they helped safeguard the right to property. Pet. 16. The link between property ownership and public records was recognized “in the early days of seventeenth-century settlement” and gave rise to “one of the first and most important American [legal] innovations”—“a system for registering and recording titles to land.” Lawrence M. Friedman, *A History of American Law* 27 (3d ed. 2005); see also George L. Haskins, *The Beginnings of the Recording System in Massachusetts*, 21 B.U. L. Rev. 281 (1941). This system—the “essence” of which “was that the record itself guaranteed title to the land”—was born out of necessity: whereas “[i]n old, traditional communities, everybody *knew* who owned the land,” in colonial America, “where land was a commodity,” recording was “an important tool of the volatile, broadly based land

market.” Friedman, *History of American Law* 27. Today, the right of access to public records is no less an “important tool” of property ownership than it was 370 years ago.

Virginia does acknowledge that the common law has long recognized a right to access public records (see Pet. 15; Br. of Judicial Watch 6-9), but contends that the right “is not being denied here, as McBurney can obtain the information he seeks on the internet and Hurlbert is free to travel to Henrico County and examine and copy any tax assessment records.” BIO 18. There is no evidence in the record to support the proposition that McBurney could obtain all the information he seeks on the internet, and Virginia cites none. To the contrary, the Fourth Circuit fully explored his standing in an earlier appeal and found it “undisputed” that he was denied access to general policy information that he requested. *McBurney v. Cuccinelli*, 616 F.3d 393, 402 (4th Cir. 2010). As to Hurlbert, this statement is at odds with the language of the citizens-only provision, which provides that “all public records shall be open to inspection and copying *by any citizen of the Commonwealth*.” Va. Code Ann. § 2.2-3704(A) (emphasis added). Thus, by the terms of the statute, Hurlbert could be turned away in person by the Henrico County Real Estate Assessor’s Office for the exact same reason that it has previously denied his record requests: because he is not a citizen of Virginia.

In any event, Virginia’s narrow conception of the historical right of access misses the point. Fair competition in the records-retrieval business and the market for public information more generally demands that in-state and out-of-state entities have access to information on the same terms. See Br. of Coalition for Sensible Public Records Access, *et al.* 15; 19-22. In a market involving large



streams of data and low margins, the need to make an in-person visit or hire an in-state proxy will often make access infeasible. *Id.* To be clear, petitioners have not asserted a freestanding constitutional right to obtain public records or to access public records in a particular form. The question here is whether Virginia, once it chooses to permit access in a particular manner, may *discriminate* against citizens of other states in extending that access, particularly where doing so interferes with non-Virginians' ability to make a living. Virginia's response—that it has no obligation to make Hurlbert's business model "profitable" in light of his "decision to live elsewhere"—cannot be reconciled with the Constitution's objective of "plac[ing] the citizens of each State upon the same footing with citizens of other States." *Paul v. Virginia*, 75 U.S. 168, 180 (1869).

Virginia next attempts to redefine the right in question as a "privilege ... to commandeer other state's officials to provide public records at or below cost." BIO 19 (capitalization omitted). In fact, Virginia is entitled to impose "reasonable charges" on records requesters and may recoup its costs entirely; the only restriction is that it may not profit by "exceed[ing] its actual cost incurred in accessing, duplicating, supplying, or searching for the requested records." Va. Code Ann. § 2.2-3704(F). There is therefore no basis in the statute (or in the record below) for Virginia's statement that "a significant portion of the costs associated with the provision of public records is borne by the taxpayers of the Commonwealth, not by the requesters of public records." BIO 4; *see also id.* 24 (suggesting that petitioners' position will strap "limited resources"). Because Virginia authorizes full recoupment of actual costs, "[r]estricting the right of access provided by FOIA to Virginia citizens ... can hardly be justified on the ground that responding to requests



for records from foreigners would overwhelm limited government resources.” Charles Bonner *et al.*, *Annual Survey of Virginia Law: Administrative Procedure*, 33 U. Rich. L. Rev. 727, 731 (1999).

Along similar lines, Virginia claims that invalidating its citizens-only restriction and adopting the Third Circuit’s approach would open the door to endless burdens on “each state’s limited resources,” leading states to “practically prohibit” a “wide variety of services.” BIO 24. Virginia, however, provides no example of a single service that would be burdened as a result. If the Third Circuit’s approach had such sweeping consequences, one would have expected them to have materialized after *Lee*.

Finally, echoing the Fourth Circuit, Virginia claims that the dormant Commerce Clause is not implicated here because the challenged statute “does not regulate commerce at all.” BIO 11. As the petition explains, however, that assertion cannot be reconciled with this Court’s decision in *Reno v. Condon*, 528 U.S. 141, 148 (2000), which held that public records released into the market are “article[s] of commerce” under the Commerce Clause. The brief in opposition offers no response to *Reno*.

Virginia further argues that it is exempt from the dormant Commerce Clause because it is “acting as a market participant.” BIO 2, 28-30. But the market-participant exception applies only when a state is competing in the market as if it were a private actor. *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 277 (1988). It does not apply where, as here, the state is “acting in its distinctive governmental capacity.” *Id.* Here, Virginia provides documents to requesters that are not otherwise available in the private marketplace: The state has sole

access to the documents and the sole capacity to make them available to the public. Under these circumstances—when private companies do not and cannot compete with the state—the state’s function is governmental and the market-participant doctrine is inapplicable.

**III. The Question Presented Is Undeniably Important, Has Substantial Practical Effects, and Can Only Be Resolved by this Court.**

Virginia makes no attempt to deny the national importance of the question presented. The closest it comes is its claim that “public records” are “not widely sold in commerce.” BIO at 30. But that unsupported assertion flies in the face of the four amicus briefs in support of certiorari, which detail the practical effects of the decision below for the diverse array of businesses, organizations, and individuals that participate in the robust national market for public information. Nor does Virginia make any effort to justify or explain the purpose of its decision to discriminate against out-of-state residents—discrimination that diverges from the laws of the majority of states but that has a disproportionately large impact on the national market for public information.

As the brief of the amici data industry groups explains, the collection, compilation, and publication of public records “inform transactions in numerous fields”—including “[r]eal estate financing, credit reporting, background checks, [and] tenant screening,” to name a few. Br. of Coalition for Sensible Public Records Access, *et al.*, at 6-7. For companies in these fields, “[p]ublic records are the essence of [their] business” and the “life-blood of [their] commercial activity.” *Id.* at 6. The completeness and reliability of data on which these companies depend—and thus the value of their services—are seriously impacted by laws that wall off entire states from the marketplace for public information. An employ-

er, for example, cannot confidently rely on a background check that omits criminal convictions in Virginia, and a lender cannot rely on a credit report that omits Virginia civil judgments and tax liens. *See id.* at 16-19.

Moreover, as the briefs of the amici media organizations and transparency groups explain, the impact of Virginia's citizens-only provision is not just economic—it also hampers the ability of non-citizens to report on national issues and engage in political advocacy. *See* Br. of Am. Soc. of News Editors, *et al.*; Br. of Citizens for Responsibility and Ethics in Washington, *et al.*; Br. of Judicial Watch. State public records, for example, were important in shedding light on the federal government's handling of the national housing meltdown. *See* Br. of Judicial Watch at 10-12; *see also* Br. of Am. Soc. of News Editors at 7-10 (listing other examples). And although Virginia's citizen-only law provides an exception for "representatives of newspapers and magazines with circulation in the Commonwealth," Va. Code Ann. § 2.2-3704(A), that exception provides no protection for many prominent news organizations that distribute their publications electronically. *See* Br. of Am. Soc. of News Editors at 16.

These problems are made substantially worse by the fact that Virginia is not the only state to restrict non-citizens' access to public records. Aside from the Delaware statute held unconstitutional in *Lee* and the Virginia statute upheld here, at least six other states impose such restrictions. *See* Br. of American Society of News Editors, *et al.*, at 10 & n.9. If the Fourth Circuit's approach to the question presented is allowed to flourish, nothing will stop other states from following suit, thus replacing the national market for public-records information with exactly the sort of Balkanized, state-by-state market that the Privileges and Immunities Clause and dormant Commerce Clause are designed to prevent.

## CONCLUSION

For the foregoing reasons, and for the reasons given in the petition, the petition for a writ of certiorari should be granted.

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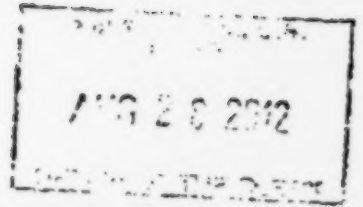
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September 2012

**AMICUS  
CURIAE  
BRIEF**





No. 12-17

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IN THE  
SUPREME COURT OF THE UNITED STATES

---

MARK J. MCBURNEY and ROGER W. HURLBERT,  
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v.

NATHANIEL YOUNG, JR., Deputy Commissioner and  
Director, Division of Child Support Enforcement,  
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County, Commonwealth of Virginia,  
*Respondents.*

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ON PETITION FOR WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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BRIEF OF *AMICUS CURIAE*  
AMERICAN SOCIETY OF NEWS EDITORS,  
ARS TECHNICA, AUTOMATTIC, CENTER FOR  
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## INTEREST OF THE *AMICI*

*Amici* include the American Society of News Editors, *Ars Technica*, Automattic, the Center for Investigative Reporting, *Daily Kos*, *Grist*, Matthew Lee of *Inner City News*, MuckRock, *Techdirt*, and Tumblr. They are bound by a common interest: journalists rely on federal and state FOIA requests to produce and share investigative stories concerning local and national news, but citizens-only restrictions in numerous state FOIA laws, including Virginia's, impose a burden on their ability to do so.<sup>1</sup>

The American Society of News Editors ("ASNE") is an organization that includes directing editors of daily newspapers throughout the Americas, and currently has some 500 members. ASNE changed its name in April 2009 to American Society of News Editors and

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<sup>1</sup> Pursuant to Rule 37.2 of the Rules of this Court, letters of consent to the filing of this brief have been submitted to the Court. Counsel of Record for Petitioners received 10 days' notice and consented to the filing, while Counsel of Record for Respondents received 5 days' notice, waived their right to 10 day notice under the rules, and thereby consented to the filing. Pursuant to Rule 37.6 of the Rules of this Court, counsel for the *amici* state that no counsel for either party to this matter authored the brief in whole or in part. Further, no persons or entities, other than the *amici* and their counsel, contributed monetarily to the preparation or submission of this brief.

approved broadening its membership to editors of online news providers and academic leaders. Founded in 1922 as the American Society of Newspaper Editors, ASNE is active in a number of areas of interest to top editors with priorities on improving freedom of information, diversity, readership and the credibility of newspapers. ASNE is a private, non-stock corporation that has no parent.

*Ars Technica* is an online publication with millions of readers nationwide and offices in San Francisco, Chicago, and New York. *Ars* provides readers with in-depth news and policy analysis about technology.

**Automattic** is a privately held for-profit technology company based in San Francisco. Founded in 2005, Automattic develops and maintains numerous Internet products, including WordPress.com, an online hosting and publishing platform that powers over 70 million individual blogs in addition to several major news websites and some of the Web's most highly trafficked sites.

**The Center for Investigative Reporting** is a California-based non-profit investigative news organization. Founded in 1977, the Center produces multimedia reporting that enables the public to demand accountability from government, corporations and others in power. Among its many projects are *The Bay Citizen*

and *California Watch*, both of which provide in-depth investigative reporting to Californians and the rest of the country.

***Daily Kos*** is an online, progressive political community and news organization with over 300,000 registered users. The users can post their own stories and comments, which are a source of news and political analysis for millions of Americans.

***Grist*** is a non-profit, online publication that serves 1.5 million readers each month with news, investigative reporting, and commentary about the environment and sustainability issues. Founded in 1999, *Grist* is based in Seattle and has a staff of 25, with journalists in Washington, California, New York, and Washington, D.C.

**Matthew Lee** is a journalist residing in New York who routinely files Freedom of Information requests at the local, state, national, and international/United Nations level for *Inner City Press (ICP)*, which he founded. Delaware's denial of his FOIA request regarding a state settlement resulted in *Lee v. Minner*, 458 F.3d 194 (3d Cir. 2006), cited above in the Table of Authorities. The remaining citizens-only FOIA provisions, such as those in Virginia and Arkansas, impede the ability of Lee and *ICP* to cover fair banking and other issues in those states.

**MuckRock** is an online open-government tool that helps members of the public and press file



federal and state FOIA requests on issues of importance to those individuals. Created by journalists and entrepreneurs, MuckRock has filed over 1,000 requests for public records, 331 of which have been successfully completed. Both Virginia and Arkansas have denied Freedom of Information requests filed through MuckRock because of their citizens-only provisions.

**Techdirt** is a group blog that serves hundreds of thousands of monthly readers. Techdirt provides analysis on government policy and technology, and has received widespread recognition for its coverage of proposed copyright legislation in 2012.

**Tumblr** is a privately held technology company, founded in 2007 and based in New York. Tumblr develops and provides tools for creators, including its blogging and social sharing platform that hosts over 70 million blogs and reaches an audience of over 140 million people each month.

## SUMMARY OF ARGUMENT

Journalists often rely on multiple state FOIA requests to break national investigative stories, to ensure the factual accuracy of national reporting, and to provide deeper analysis of national data trends for readers across the country. Yet up to eight state FOIA statutes have "citizens-only provisions" that limit access only to the state's own residents.

Whether these citizens-only provisions are constitutional is an important question only this Court can resolve. The Third and Fourth Circuits are split on their constitutionality, with Delaware's provision being held to violate the Privileges and Immunities Clause in the Third Circuit, while the Fourth Circuit upheld Virginia's provision. Meanwhile, the Sixth Circuit is hearing another challenge to a similar citizens-only provision. In light of the ongoing legal uncertainty, these restrictions continue to impose burdens on traditional and online journalists who are investigating news of national significance.

Only Virginia's citizens-only provision offers an exemption for *some* media organizations. But the partial exemption merely increases the confusion faced by other journalists--including those who do not represent traditional newspapers, print magazines, or FCC licensed broadcast stations. Therefore, Virginia's exemption increases the risk of discrimination against the many journalists not covered by it.

Because this legal uncertainty hangs over journalists seeking records in many different states, it will continue to burden investigative reporting until this Court resolves it. The Court should take this opportunity to clarify the state of the law and find citizens-only provisions unconstitutional.

## ARGUMENT

### I. THE COURT'S GUIDANCE IS NEEDED ON THE CONSTITUTIONALITY OF CITIZENS-ONLY PROVISIONS OF STATE FOIA LAWS.

Journalists rely on state FOIA requests to break news stories of national significance. Yet journalists continue to face substantial legal uncertainty regarding citizens-only provisions in several state FOIA statutes.

#### A. *Journalists Often Rely on State FOIA Requests to Gather and Analyze National News for Citizens in Every State.*

Journalists often rely on state FOIA requests to break national news.

First, some state records are of national import. Virginia is a large, economically significant state that is home to Fortune 500 companies, major banks, military contractors, and celebrated universities. Stories concerning many of these institutions would have national significance. Moreover, state records gain national significance when a former state official campaigns for national office. State records of former governors, such as Arkansans Bill

Clinton and Mike Huckabee, took on national significance when those individuals ran for President of the United States.

Second, FOIA requests to multiple states can shed light on interstate issues. State FOIA requests may inform coverage of cross-border water disputes, national migrant labor issues, and interstate industrial siting incentives. Additionally, many regulatory frameworks rest on *federal* policy (and subsidies) coupled with *state* implementation. For example, journalists will likely file multiple state FOIA requests across the nation to investigate implementation of the recent federal healthcare law. Similarly, journalists will likely file multiple state FOIA requests to determine how local law enforcement agencies deploy new technologies—from surveillance drones to facial recognition tools.

Indeed, journalists at *Ars Technica*, an *amicus*, have been pursuing an investigative report to better understand how law enforcement agencies around the country use license plate readers, tools that photograph license plates and match them against databases to detect expired registrations and more serious infractions.<sup>2</sup> Even though the federal government encourages the adoption of such technology largely through grants funded by the Drug Enforcement Agency to state and local law enforcement, *Ars* reporters

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<sup>2</sup> Charlotte Albright, *License Plate Readers Spark Privacy Concerns*, NPR.ORG, July 26, 2012.

had to file FOIA requests in many states to understand how those states actually use the technology—how long they store photographed licenses and with whom they share the information.<sup>3</sup>

The Virginia statute at issue in this case has already had an impact on the ability of researchers to access pertinent information of this nature. Earlier this year a MuckRock representative filed a request with the Virginia State Police for documents relating to the department's use of aerial surveillance drones; the request was denied due to the requester's out-of-state residency.<sup>4</sup> A subsequent request made by a Virginia citizen for similar documents was processed without issue.<sup>5</sup> With domestic use of aerial drones becoming a matter of national importance,<sup>6</sup> citizens-only provisions like Virginia's result in a tangible harm by restricting the dissemination of this newsworthy information to the public.

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<sup>3</sup> G.W. Schulz, *DEA Installs License-Plate Recognition Devices Near Southwest Border*, ARS TECHNICA, July 11 2012.

<sup>4</sup> Virginia State Police Drone Documents | Muckrock, <https://www.muckrock.com/foi/virginia-128/Virginia-state-police-drone-documents-1491/> (last visited Aug. 26, 2012).

<sup>5</sup> Virginia State Police Drone Documents | Muckrock, <https://www.muckrock.com/foi/virginia-128/Virginia-state-police-drone-documents-1661/> (last visited Aug. 26, 2012).

<sup>6</sup> Jason Koebler, *Police to Use Drones for Spying on Citizens*, U.S. NEWS, Aug. 23, 2012.



Transparency mechanisms like state FOIA laws have a beneficial impact on journalism and the general public. They make the job of reporting relevant information to citizens easier and less costly, “improving the general health of local media systems and the vitality of reporting.”<sup>7</sup> Although citizens have easier access to government records through these laws, journalists continue to play a crucial role in that they “prod, question, and verify” this information and deliver it to the public in an accessible manner.<sup>8</sup>

But because of citizens-only provisions, any journalist must piece together a *national* investigative story without access to all of the necessary *state* pieces. By definition, journalists cannot be residents of all the states from which they request information in pursuing a national story. In several states, such as Arkansas, Missouri, New Jersey, Tennessee, and Virginia, non-citizens are denied the same right to obtain records that is enjoyed by citizens of those states.

Even though most states lack citizens-only limitations, journalists generally need *all* the pieces, or at least specific pieces, to make sense of a puzzle for their readers. These states’

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<sup>7</sup> STEVEN WALDMAN, WORKING GROUP ON INFORMATION NEEDS OF COMMUNITIES, FED. COMM. COMM’N., THE INFORMATION NEEDS OF COMMUNITIES 20 (2011).

<sup>8</sup> *Id.*

citizens-only provisions frustrate such investigations, imposing additional costs on all journalists who attempt to pursue those stories.

***B. Journalists Face Conflicting Circuit Court Precedent and Ongoing Litigation.***

Citizens-only provisions are subject to conflicting and uncertain circuit authority. At least eight state statutes impose citizens-only provisions on state FOIA requests.<sup>9</sup> Of these eight, one state's provision has been declared unconstitutional by a circuit court (Delaware's in the Third Circuit). One is currently the subject of a constitutional challenge before another circuit court (Tennessee's in the Sixth Circuit). Another was upheld in the decision below (Virginia's in the Fourth Circuit).

Notably, every one of the states that enforces its citizens-only provision also rejects access for out-of-state journalists, burdening all journalists across the nation.<sup>10</sup> Of these states, none of them

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<sup>9</sup> Alabama ALA. CODE § 36-12-40 (2012); Arkansas ARK. CODE ANN. § 25-19-105 (West 2012); Delaware - DEL. CODE ANN. tit. 29, §10003 (2012); Missouri MO. ANN. STAT. § 109.180 (West 2012); New Hampshire N.H. REV. STAT. ANN. § 91-A:4 (2012); New Jersey - N.J. STAT. ANN. §47:1A-1 (West 2012); Tennessee - TENN. CODE ANN. § 10-7-503 (West 2012); Virginia VA. CODE ANN. § 2.2-3704(A) (West 2012). Earlier this year, Georgia amended its statute to remove the citizens-only provision. GA. CODE ANN. §50-18-71(a) (West 2012).

<sup>10</sup> Meanwhile, one of the eight states interprets its statute to permit out-of-state requests as a matter of  
(footnote continued...)

provides a specific exemption for out-of-state journalists except for a *partial* exemption in Virginia, discussed below in Part II.

As a result of these divergent holdings in two circuits, ongoing litigation in a third, and the lack of meaningful exemptions for media outlets, investigative journalists face different interpretations of the federal Constitution in different regions of the country and open-ended legal ambiguity in other regions. No institution other than this Court can resolve this uncertainty and conflict.

**C. *The Fourth Circuit's Attempt in the Decision Below to Distinguish Conflicting Third Circuit Precedent Fails and Provides No Guidance to Journalists.***

In the decision below, the Fourth Circuit failed to distinguish its holding from the Third Circuit's conflicting holding in *Lee v. Minner*.<sup>11</sup> It therefore provided journalists no meaningful legal guidance on when a citizens-only law is unconstitutional—other than the happenstance of whichever circuit governs a particular state.

The Fourth Circuit upheld the Virginia

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policy (Alabama). Op. Att'y Gen. Ala. No. 2001-107 (Mar. 1, 2001). Another state, with nearly identical statutory language, has not provided journalists the benefit of a policy clarification (New Hampshire).

<sup>11</sup> 458 F.3d 194 (3d Cir. 2006).

FOIA's citizens-only provision, rejecting a challenge based on the Privileges and Immunities Clause and the Interstate Commerce Clause. Previously, in *Lee*, the Third Circuit held that Delaware's nearly identical citizens-only provision violated the Privileges and Immunities Clause because access to news and political information is basic to the "liveliness of the nation as a single entity."<sup>12</sup>

The Fourth Circuit refused to follow the Third Circuit's reasoning for two reasons. First, the Fourth Circuit admitted the circuit split and dismissed the Third Circuit's holding altogether: "as out-of-circuit authority, [*Lee*] is not binding on this Court."<sup>13</sup>

Second, the Fourth Circuit concluded that *Lee* is "materially distinguishable from the situation presented by the Appellants" because the "right identified in *Lee*—'to engage in the political process with regard to matters of both national political and economic importance,'—is not the same right the Appellants advance."<sup>14</sup> *Lee* concerned an author-activist, Matthew Lee, who wrote for a blog he founded called *Inner City Press*.<sup>15</sup> Lee sought documents related to a

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<sup>12</sup> 458 F.3d at 200-01 (internal citation omitted).

<sup>13</sup> *McBurney v. Young*, 667 F.3d 454, 465 (4th Cir. 2012).

<sup>14</sup> *Id.* (internal citation omitted).

<sup>15</sup> Maria Aspan, *As Blogs Proliferate, a Gadfly With Accreditation at the U.N.*, N.Y. TIMES, Apr. 30, 2007.

planned settlement between the State of Delaware and a financial services company.<sup>16</sup> According to the Fourth Circuit, the Petitioners here asserted a different right—one of “personal import” and a “generalized right of access,”<sup>17</sup> rather than seeking “information to advance the interests of *other citizens or the nation as a whole*, or that is of political or economic importance.”<sup>18</sup> That is, according to the Fourth Circuit, the Petitioners’ motivation was different from—and essentially more self-serving than—Matthew Lee’s.

Distinguishing the cases based on the out-of-state filers’ motivation provides no guidance to journalists. First, the Fourth Circuit makes a distinction without a difference. Journalists’ motivations are often simultaneously selfless and self-serving. A free market system such as ours assumes that individuals generally follow their own personal interests, and adopts laws based on that assumption.<sup>19</sup> Journalists have some “personal import” in every state FOIA request they file whether in their home state or elsewhere. Their salaries or income from direct sales, advertising, charitable contributions, or

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<sup>16</sup> Lee, 458 F.3d at 194-95.

<sup>17</sup> McBurney, 667 F.3d. at 465-66.

<sup>18</sup> *Id.* at 465 (emphasis added).

<sup>19</sup> ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 16 (Edwin Cannan, ed., Methuen 1904) (1776).



grants depend partly on the request. Of course, at the same time, journalists' requests *also* generally "advance the interests of other citizens or the nation as a whole," including the interests of their readers and other citizens benefiting from the requests.

Conversely, in the case below, though not journalists, Petitioners filed VFOIA requests at least partly to advance the interests of *other citizens* in addition to their own. The other citizens benefited include Hurlbert's real estate clients seeking assessments and McBurney's children who rely on child support payments. Perhaps because of these overlapping motivations, residents who live in Virginia (and other citizens-only states) can file state FOIA requests based purely on "personal import" without claiming to advance the interests of others.

Moreover, not only is this distinction confused conceptually, it invites discrimination in its practical application. Even if a state official could determine that some FOIA filings had sufficiently minimal personal benefit (or sufficiently important other-regarding benefits), resting the constitutionality of citizens-only exclusions on a litigant's motivation can only lead to legal confusion and potential discrimination. States cannot practically divine the motivations of requesters. Requesters would downplay the personal import of their requests, so states would in turn speculate about the unstated, personally interested motivations for

at least some requests.

As a result of these conceptual and practical failures, the distinctions only serve to highlight the irreconcilable conflict between the two circuits. Indeed, the purported distinctions do not successfully distinguish the opposed holdings and therefore provide little legal guidance to journalists and other litigants seeking state records.

## II. VIRGINIA'S EXEMPTION FOR *SOME* OUT-OF-STATE JOURNALISTS COMPOUNDS THE HARM BY INVITING DISCRIMINATION AGAINST *OTHER* JOURNALISTS.

The Virginia legislature, perhaps recognizing the burden on journalism posed by the VFOIA citizens-only provision, specifically exempted non-citizens who are:

representatives of newspapers and magazines with circulation in the Commonwealth, and representatives of radio and television stations broadcasting in or into the Commonwealth.<sup>20</sup>

This partial media exemption does not cover journalists working at several of the *amici* organizations—even though these journalists investigate stories of importance to Virginians and serve thousands of readers in the state.

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<sup>20</sup> VA. CODE ANN. § 2.2-3704(A).

Indeed, the partial exemption provides additional legal confusion and the potential for discrimination against these journalists.

Many of the *amici* organizations are not clearly covered by the exemption. State and municipal agencies in Virginia could plausibly argue several of *amici's* journalists are not representatives of "newspapers," "magazines," or "broadcast stations." *Ars Technica*, *Daily Kos*, *Grist*, and *Techdirt*, for example, are not broadcast licensees and do not print newspapers or magazines. Rather, they provide news, collectively to millions, through websites, mobile and tablet apps, and the sales of specific long-form articles.<sup>21</sup>

Indeed, like these *amici*, many prominent news organizations now print or broadcast nothing. Some traditional outlets, such as the *Seattle Post-Intelligencer*, have stopped printing a physical newspaper. Others still print newspapers in their home regions, while merely relying on online "circulation" in Virginia. Still, other, more recently founded outlets have never published in print or broadcast. At least three of them have reporters in the White House press pool: *Talking Points Memo* (which began as the

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<sup>21</sup> App Store – The Daily Caller, <http://itunes.apple.com/us/app/the-daily-caller/id381099982?mt=8> (last visited Aug. 1, 2012); About Us | Ars Technica, <http://arstechnica.com/about-us/> (last visited July 29, 2012).

personal blog of Josh Micah Marshall and now employs several full-time journalists), the *Huffington Post* (which employs journalists in several cities and has won a Pulitzer Prize in National Reporting for a ten-part series on the post-war lives of wounded American soldiers and their families), and the *Daily Caller* (which also employs full-time journalists and breaks news).<sup>22</sup> *ProPublica*, another online-only publication, won a 2011 Pulitzer Prize for National Reporting and a 2010 Pulitzer Prize for Investigative Reporting.<sup>23</sup> These sources attract millions of readers daily.<sup>24</sup> Yet even smaller operations reach millions of readers; *Techdirt* has six full-time staff and reaches 1.5 to 2 million readers online every month.<sup>25</sup>

Even if Virginia agencies interpret the media exemption expansively to cover online news

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<sup>22</sup> Keach Hagey, *Huffington Post, Politico Win Pulitzer Prizes*, WALL ST. J., Apr. 16, 2012.

<sup>23</sup> About Us — ProPublica, <http://www.propublica.org/about> (last visited July 29, 2012).

<sup>24</sup> Press Release, Talking Points Memo, Talking Points Memo Audience up 79% in March; Readers Driving Growth with Social Media and Sharing (Apr. 5, 2010); Adam Clark Estes, *The Huffington Post Passes The New York Times in Traffic*, THE ATLANTIC WIRE, June 9, 2011; About Us | The Daily Caller, <http://www.dailycaller.com/footer/about-us/> (last visited July 29, 2012).

<sup>25</sup> About Techdirt, <http://www.techdirt.com/about.php> (last visited July 29, 2012).

outlets and to include online circulation in the state, this reading would invite considerable discrimination and has no clear logical boundaries. A Virginia official would have to determine whether *Daily Kos*, *Grist*, *Ars Technica*, or *Techdirt* qualify as “newspapers” or “magazines” under the statute. At the same time, an official would have to determine whether an independent researcher with a blog and Twitter “microblog” fits within the statutory language as a “representative” of a “newspaper” or “magazine”—even if that individual is a well-known cybersecurity researcher who frequently files federal and state FOIA requests regarding online surveillance.<sup>26</sup> Finally, the official would have to determine whether an out-of-state resident who signed up for a blog using Automattic’s WordPress.com offerings—or signed up to be a blogger in the *Daily Kos* community—the day before filing the Virginia FOIA request qualifies for the media exemption. Unless Virginia decides that *anyone* with a blog using Automattic’s offerings or microblog using Twitter or Tumblr by default qualifies for the media exemption (thus swallowing the citizens-only rule), a state official must make substantive

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<sup>26</sup> Chris Soghoian is an independent researcher whose extensive FOIA work revealing security exploits has been well documented. See Mike Kessler, *The Pest Who Shames Companies Into Fixing Security Flaws*, WIRED, Nov. 23, 2011. Soghoian only maintains a blog and a Twitter account; both have large followings.



determinations regarding which online publications, if any, qualify for the exemption. Such decisions would invite discrimination and provide little certainty.

Indeed, the recent democratization of the press poses the deepest problems for Virginia's partial media exemption. Any non-citizen could be an out-of-state journalist. Thanks to technological innovations over the past two decades, critics no longer complain that freedom of the press belongs only to those who own one.<sup>27</sup> The barriers to entry for disseminating news have decreased and the "minimum scale" for a news business can be little more than *one person*, like Matthew Lee, deeply devoted to a cause. As the FCC declared, these citizen journalists are as necessary as professional ones, calling the "either or" choice between the two a false dichotomy in today's world of journalism.<sup>28</sup>

Two decades ago, the average American could reach large audiences only by handing out pamphlets, posting lawn signs, and (with luck) publishing a letter to the editor in one-newspaper towns. Reaching *national* audiences was even more unlikely. That changed with the initial dial-up Internet technologies in the 1970s and, more significantly, the diffusion of the World Wide Web in the 1990s. As early as 1997,

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<sup>27</sup> A.J. Liebling, *Do You Belong in Journalism?*, THE NEW YORKER, May 14, 1960, at 105.

<sup>28</sup> WALDMAN, *supra* note 4, at 30.

writing about dial-up Internet, this Court recognized that “any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox.”<sup>29</sup>

Since then, the power of average Americans to communicate has continued to evolve and increase. Many Americans have upgraded from slower dial-up connections to far faster, always-on connections, such as wireline and mobile broadband technologies.<sup>30</sup> These technologies connect Americans to everything available on the Internet—and far more businesses and just about every traditional (and non-traditional) journalistic organization around the world now has an Internet presence.

New software has made it even easier for the average American to become a citizen-journalist.<sup>31</sup> Software developers have created tools that make it easy for anyone, working from anywhere, to create and disseminate journalism. Software tools produced by Blogger, Automattic, and Tumblr power the blogs of individuals, think tanks, and political movements; they even underlie the sites of large news organizations

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<sup>29</sup> *Reno v. ACLU*, 521 U.S. 844, 870 (1997).

<sup>30</sup> JOHN B. HARRIGAN, FED. COMM. COMM’N., *BROADBAND ADOPTION AND USE IN AMERICA* 13-15 (2010).

<sup>31</sup> WALDMAN, *supra* note 4, at 15.

and many of the most popular sites online.<sup>32</sup>

As a result of these technological and social developments, today, more Americans get most of their news through the Internet than through print newspapers or broadcast radio.<sup>33</sup> While traditional news sources have large readerships online, younger online news organizations and individual bloggers also provide news to Americans in every state throughout the nation.

These trends show no signs of abating. Next generation networks, such as the Google Fiber project in Kansas City, Missouri, provide speeds at least 100 times faster than the connections available to those living in Washington, D.C. or New York City.<sup>34</sup> Such high-speed connections will lead to innovative applications, content, and social practices that take advantage of these incredibly fast speeds—just as the past decade’s transition from dial-up to always-on, fast connections gave birth to everything from Facebook to the NPR News app to the Tumblr-based site behind the Occupy Movement called “We are the 99%.”

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<sup>32</sup> Frederic Lardinois, *Study: Half Of The Top 100 Blogs Now Use WordPress*, TECHCRUNCH, Apr. 11, 2012.

<sup>33</sup> PEW RESEARCH CENTER FOR THE PEOPLE & THE PRESS, INTERNET GAINS ON TELEVISION AS PUBLIC’S MAIN NEWS SOURCE (2011).

<sup>34</sup> Carey Gilliam & Yinka Adegoke, *Google Unveils Ultrafast Internet/TV in Kansas City*, REUTERS, July 27, 2012.

Despite these new technologies, human agency remains central to good journalism. Individual and institutional journalists still need to uncover, piece together, and confirm news stories involving the public and private institutions that affect readers' lives. To accomplish this, they may need to rely on state FOIA requests—but they cannot do so in several states, including Virginia's, if they do not fall within the partial exemption.

As a result, the Virginia statute upheld by the Fourth Circuit imposes significant burdens on today's national investigative reporters, independent researchers, and citizen-journalists. For these diverse journalists, the burdens are perhaps equal to those imposed by other citizens-only provisions lacking even the partial media exemption found in Virginia's statute.<sup>35</sup>

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<sup>35</sup> The Fourth Circuit made no attempt to address arguments raised by *amici* large media organizations in that case, partly because those organizations actually were newspapers, magazines, or broadcast stations apparently subject to the media exception. *McBurney*, 667 F.3d at 461 n.1.

## *CONCLUSION*

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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**AMICUS  
CURIAE  
BRIEF**

RECORD  
AND  
BRIEFS

No. 12-17

Supreme Court, U.S.  
FILED

AUG 20 2012

OFFICE OF THE CLERK

IN THE

# Supreme Court of the United States

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MARK J. MCBURNEY AND ROGER W. HURLBERT,  
*Petitioners,*

*v.*

NATHANIEL YOUNG, JR., Deputy Commissioner and  
Director, Division of Child Support Enforcement,  
Commonwealth of Virginia, and THOMAS C. LITTLE,  
Real Estate Assessment Division, Henrico County,  
Commonwealth of Virginia,  
*Respondents.*

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ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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BRIEF FOR AMICI CURIAE CITIZENS FOR  
RESPONSIBILITY AND ETHICS IN WASHINGTON  
(CREW), ET AL., IN SUPPORT OF PETITIONERS

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## **INTEREST OF AMICI CURIAE<sup>1</sup>**

Amici are public-interest organizations committed to government transparency and accountability. As such, they are well-positioned to attest to the benefits of broadly inclusive state freedom of information laws. Additionally, amici are knowledgeable about the harms that citizens-only provisions inflict upon non-citizen professionals dependent on access to state public records for their livelihoods, non-citizens who wish to reside and purchase property in other states, and non-citizens who wish to engage in political advocacy in states with citizens-only provisions.

Citizens for Responsibility and Ethics in Washington (CREW) is a nonprofit organization based in Washington, DC dedicated to promoting ethics and accountability in government. CREW advances its mission using a combination of research, litigation and media outreach to ensure officials act ethically and lawfully and to bring unethical conduct to the public's attention.

The Center for Media and Democracy (CMD) is a nonpartisan, non-profit investigative reporting group based in Madison, Wisconsin. CMD is committed to "citizen journalism" as an alternative to mass media, producing hundreds of original stories that promote corporate and government accountability.

The Electronic Frontier Foundation (EFF) is a non-profit, member-supported civil liberties organiza-

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<sup>1</sup> Counsel of record for both parties received timely notice of the intent to file this brief and letters consenting to the filing have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person, other than amici, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

tion with offices in San Francisco, California and Washington, DC that works to protect rights in the digital world. EFF actively encourages and challenges industry, government, and the courts to support free expression, privacy, and transparency in the information society. In support of its mission, EFF regularly files public records requests with state and federal agencies in order to better understand the ways law enforcement agencies use technology. In the past year, EFF has filed such requests in seven different states.

The Electronic Privacy Information Center (EPIC) is a non-profit research center located in Washington, DC. EPIC pursues numerous Freedom of Information Act cases with federal agencies and also publishes a leading FOIA manual, *Litigation Under the Federal Open Government Laws*. EPIC has litigated FOIA cases under the Virginia open records law. As a result, EPIC is intimately familiar with the freedom of information law at the heart of this lawsuit—including the citizens-only provision—and is well-suited to aid the Court in considering its constitutionality.

The National Freedom of Information Coalition (NFOIC) is a nonprofit organization that works to raise public awareness about the importance of transparency and to protect the public's right to open government. With offices at the Missouri School of Journalism, NFOIC awards grants to its affiliated state- and region-based freedom of information organizations for their work in fostering, educating, and advocating for open, transparent government. NFOIC also administers the Knight FOI Fund, a half-million-dollar perpetual legal fund to assist litigants advocating for open government in important and meritorious legal cases.

OpenTheGovernment.org is a Washington, DC-based nonpartisan coalition of journalists, consumers, good- and limited-government groups, environmentalists, librarians, labor unions, and others whose mission is to increase government transparency to improve public safety and trust, and to promote democratic accountability. OpenTheGovernment.org takes a multi-prong approach to accomplishing its mission through public education, advocacy, and collaboration with government agencies to decrease secrecy.

The Project On Government Oversight (POGO) is a nonpartisan, independent investigative organization based in Washington, DC that champions good government reforms. POGO investigates corruption, misconduct, and conflicts of interest in government through freedom of information requests, interviews, and other fact-finding strategies. As a result of these investigations, POGO has found that nondisclosure of government records often is intended to hide corruption, intentional wrongdoing, or mismanagement.

The Sunlight Foundation is a nonpartisan, non-profit organization based in Washington, DC that uses the power of the Internet to catalyze greater government openness and transparency. Sunlight is committed to improving access to government information by making it available online, and by creating new tools and websites to enable individuals and communities to better access that information and put it to use. Sunlight also engages in advocacy to require that government make data available in real time and trains thousands of journalists and citizens in using data and the web to be watchdogs.

The Washington Coalition for Open Government (WCOG), the Virginia Coalition for Open Government

(VCOG), and the Tennessee Coalition for Open Government (TCOG) are nonpartisan, non-profit coalitions dedicated to promoting and defending the right to know. VCOG has kept a log of out-of-state citizens who wished to file Virginia FOIA requests and thus is familiar with both the mechanics and detrimental impact of the citizens-only provision.

### **REASONS FOR GRANTING THE PETITION**

Petitioners argue that the Virginia Freedom of Information Act's citizens-only provision, Va. Code. Ann. § 2.2-3704(A), violates the Privileges and Immunities Clause and the dormant Commerce Clause. U.S. Const. art. IV, § 2. Six years ago, the Third Circuit struck down as unconstitutional a citizens-only provision in Delaware's open records law. *Lee v. Minner*, 458 F.3d 194 (3d Cir. 2006). The court concluded that the "citizens-only provision of Delaware's Freedom of Information Act burdens noncitizens' right to 'engage in the political process with regard to matters of national political and economic importance.'" *Id.* at 198. The Fourth Circuit's decision in this case, preserving Virginia's discriminatory law, squarely conflicts with the Third Circuit's holding in *Lee*. *Amici* urge this Court to grant the Petition and make clear that the Constitution does not permit a state's open records law to discriminate against citizens of other states.

It is vital that the Court resolve this question now, because citizens-only provisions have a real, detrimental impact on noncitizens' fundamental rights. These rights include the right to pursue common callings, reside and purchase property in other states, and participate in political advocacy. As a result, noncitizens are *not* on "the same footing with citizens of other States, so far as the advantages resulting from citizen-



ship in those States are concerned.” *Hicklin v. Orbeck*, 437 U.S. 518, 524 (1978) (quoting *Paul v. Virginia*, 75 U.S. 168, 180 (1869)). The examples in this brief illustrate the ongoing harm that noncitizens suffer as a result of the discriminatory law.

Resolution is also necessary now because states with active citizens-only provisions—among them, Virginia, Arkansas, and Tennessee—enforce these provisions inconsistently and according to the whim of the records custodian. Inconsistent enforcement and lack of oversight in these states permit records custodians to deny out-of-state requests based on the nature of the request or the identity of the requester, undermining the goals of open records laws and compounding the harm to noncitizens.

#### **I. VIRGINIA’S CITIZENS-ONLY PROVISION HARMS NONCITIZENS’ CONSTITUTIONALLY PROTECTED RIGHTS**

The Privileges and Immunities Clause prohibits a state from treating citizens of other states in a discriminatory manner. U.S. Const. art. IV, § 2. The Clause is intended to “place the citizens of each State upon the same footing with citizens of other States” with respect to fundamental rights such as pursuing an occupation, residing in a state, owning property, and engaging in political advocacy. *Baldwin v. Fish & Game Comm’n*, 436 U.S. 371, 380, 397 (1978) (internal quotation marks omitted); *Lee*, 458 F.3d at 200.

A state violates the Privileges and Immunities Clause when it imposes burdens on the ability of noncitizens to exercise these fundamental rights, unless there is a substantial reason for the difference in treatment and the discriminatory practice bears a substantial relationship to the state’s objective. *Supreme Ct. of N.H.*



v. *Piper*, 470 U.S. 274, 284 (1985). Virginia has no substantial reason for the discriminatory treatment of noncitizens, and its discriminatory treatment bears no substantial relationship to a proper state objective.

### **A. Right To Pursue A Common Calling**

Virginia's citizens-only provision harms noncitizens who engage in occupations that require access to state public records. States may not discriminate against "nonresidents seeking to ply their trade, practice their occupation, or pursue a common calling within the State." *Hicklin*, 437 U.S. at 524. Access to state public records is crucial to non-residents in a wide range of occupations, including academics and researchers such as historians, sociologists, and epidemiologists, as well as other professionals like genealogists, attorneys, land developers, architects, private investigators, journalists, and data brokers.

Virginia places non-resident members of their trades at a disadvantage to state residents. Either noncitizens are denied access to Virginia records, or they must hire a Virginia "middleman" to request the documents on their behalf, resulting in an added expense that is not borne by their Virginia counterparts. This expense, compounded across multiple requests for records, results in a discriminatory, increased cost of doing business.

Consider, for example, a genealogist in the United States hired to chart a client's family tree. Suppose the genealogist and his client reside outside of Virginia, but a large branch of the client's family resided in Virginia. Public records are the bread and butter of a genealo-

gist's trade.<sup>2</sup> But Virginia's resident-only requirement would impede the work of the genealogist, with the practical consequence that he would have to hire someone in state to complete the work. This discrimination funnels more business to Virginia genealogists and amounts to an impermissible advantage to Virginia trade members at the expense of noncitizens.

Epidemiology is another important example of a common calling for which access to state public records is critical. According to the National Center for Health Statistics, "[t]he practice of epidemiology, or indeed of public health, would today be inconceivable without access to vital and health records and the tabulations routinely assembled from them."<sup>3</sup> Doctors and medical researchers rely on birth and death certificates—state public records that are far more detailed now than in the past—for the “measurement of incidence and prevalence of disease”; for “comparison[s] of disease rates in different populations, in different parts of the same population, and in similar groups over a period of time, in order to develop hypotheses regarding the etiology of disease”; for identification of high risk groups for study or therapy; as a “starting point for ‘follow-back’ studies in which a series of cases with particular

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<sup>2</sup> Association of Professional Genealogists, *The Case for Open Public Records: A Position Paper* (Jan. 3, 2008), <http://www.apgen.org/publications/press/APG-KGROW.pdf>; Bentley, *The Genealogist's Address Book* (4th ed. 1998) (collecting addresses of state vital records departments).

<sup>3</sup> National Center for Health Statistics, *Use of Vital and Health Records in Epidemiological Research: A Report of the United States National Committee on Vital and Health Statistics* 1 (1968), available at [http://www.cdc.gov/nchs/data/series/sr\\_04/sr04\\_007.pdf](http://www.cdc.gov/nchs/data/series/sr_04/sr04_007.pdf).

characteristics (e.g. dying from a particular disease) is identified"; and as the "end point for studies in which subsets of the population are selected because of their unusual characteristics or environmental exposures and followed to identify diseases or other outcomes suspected of being related to the selected factors."<sup>4</sup> Such uses of public records can assist with analyzing the development of both chronic and infectious diseases.<sup>5</sup> Thus, for example, if an out-of-state doctor or medical researcher wanted to gather information about the development of lung cancer by smokers in Virginia, she would face an impermissible burden as compared to her in-state counterparts.<sup>6</sup>

Likewise, historians, sociologists, and other academic researchers rely on access to public records. As one of many examples, state and local public records

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<sup>4</sup> *Id.* at 1-2.

<sup>5</sup> *Id.*; Florida Department of Health, *Acute Disease Epidemiology Surveillance, Reporting, and Investigations* (July 2012), available at [http://www.doh.state.fl.us/disease\\_ctrl/epi/Acute/systems.html](http://www.doh.state.fl.us/disease_ctrl/epi/Acute/systems.html); see also Borkowski, *Sunshine Law Helps Reporter Expose Major TB Outbreak in Florida*, *The Pump Handle* (July 12, 2012), available at <http://scienceblogs.com/thepumphandle/2012/07/12/sunshine-law-helps-reporter-expose-major-tb-outbreak-in-florida/>.

<sup>6</sup> To be sure, some of these records may be accessible at the federal level through the Census Bureau, which has data-sharing arrangements with the states, but federal aggregation efforts have been, for the most part, deemed widely ineffective. See Diamond et al., *Collecting And Sharing Data for Population Health: A New Paradigm*, 28 *Health Affairs* 454, 455-456 (2009) (analyzing the failures of large-scale data collection efforts of vital statistics). As such, access to state public records for public health purposes remains vital to the profession of epidemiology.

are integral to the study of African-American history.<sup>7</sup> Historical data relating to population growth, economic trends, and health conditions are uniquely reflected in state and local records. These records also bear on innumerable contemporary issues, from pollution levels to rates of teen pregnancy. A tax-policy researcher, as one example, used state and local records to compare the value of charity care provided by non-profit hospitals to the value of their property tax exemptions.<sup>8</sup> Novel source materials and newly unearthed facts are the currency of research professions, and state and local records are treasure troves of information. Academics and researchers from outside the state encounter greater barriers to these resources in Virginia than their in-state counterparts.

Access to public records is equally vital in other occupations. Land developers need access to documents such as title records, zoning plans, crime statistics, and school-performance data when selecting the best sites for their projects. Journalists need access to public records to break stories—especially those about govern-

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<sup>7</sup> *Sources on African American History*, in *Blacks in East Texas History* 12-13 (Glasrud et al. eds., 2008) ("For the post-1865 period, the records of city councils, health departments, and school boards are valuable sources for studies of topics such as education and law enforcement.").

<sup>8</sup> See Harris & Strouse, *A Cost/Benefit Analysis of Providing Tax-Exempt Status to Non-Profit Hospitals* 3, 13 (May 1997), available at <http://ssrn.com/abstract=72252>; see also Shapiro et al., *The Social Costs of Dangerous Products: An Empirical Investigation*, 18 Cornell J.L. & Pub. Pol'y 775, 783 (2009) (analyzing product liability case awards data gleaned from state and county public records).



ment officials. Private investigators, architects, and data brokers also require frequent access to public records.

This Court has repeatedly “found that one of the privileges which the Clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State.” *Supreme Ct. of N.H.*, 470 U.S. at 280 (internal quotation marks omitted). This broad privilege protects against even incidental burdens to pursuing one’s occupation. For example, this Court cited the privilege in striking down a state income tax provision that discriminatorily barred nonresidents from deducting alimony payments. *See Lunding v. New York Tax Appeals Tribunal*, 522 U.S. 287, 302 (1998). The Court reasoned that the state had not presented a substantial justification for the difference in tax burdens between citizen and noncitizen workers. *Id.* at 315. Likewise, in each of the above examples and in numerous others, Virginia’s citizens-only provision discriminatorily burdens nonresidents who request Virginia records in pursuit of their work.

As *Lunding* illustrates, it does not matter if a discriminatory burden is imposed indirectly as opposed to directly. Yet the Fourth Circuit found otherwise, stating “[w]hile it may be true that VFOIA coincidentally limits a method by which Hurlbert conducts some of his business, it does not follow that the VFOIA impermissibly burdens his ability to pursue his common calling within the Commonwealth in a Privileges and Immunities Clause context. As the district court found, ‘[t]he statute’s effect on Hurlbert’s ability to practice his common calling is merely incidental.’ We agree.” *McBurney v. Young*, 667 F.3d 454, 465 (4th Cir. 2012) (internal citations omitted). The Fourth Circuit’s distinction between direct and indirect burdens to funda-



mental rights, however, finds no support in the Privileges and Immunities case law. Instead, the key issue is “the practical effect of the provision.” *Lunding*, 522 U.S. at 299. Where, as here, the law has an actual discriminatory effect on the ability of nonresidents to pursue a common calling, the State bears a substantial burden to justify that differential treatment. Indeed, a rule that depended on distinguishing between direct and indirect effects would encourage states to pass laws designed as subterfuges, where the burden on noncitizens was the true purpose of the law but was achieved indirectly to disguise that purpose—a result against which this Court has warned in a variety of constitutional contexts. See, e.g., *Hunter v. Erickson*, 393 U.S. 385, 391 (1969) (equal protection); *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 201 (1994) (“The commerce clause forbids discrimination, whether forthright or ingenious.”).

The Virginia law’s disparate treatment of citizens and noncitizens also runs afoul of the dormant Commerce Clause, which is analytically distinct from the Privileges and Immunities clause but addresses the same core problems. Restricting access to public records is precisely the kind of “economic barrier” that “plainly discriminates against interstate commerce,” because state residents in industries or professions that rely on public records enjoy a distinct advantage over their out-of-state counterparts. See *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 (1951). As this Court has held, “where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected.” *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). Such legislation—like the citizens-only provision at issue here—can survive only if it serves a legitimate local purpose that could not be

equally achieved by nondiscriminatory means. See *Maine v. Taylor*, 477 U.S. 131, 138 (1986). As the open government laws of the vast majority of states show, there is a clear “nondiscriminatory means” of providing access to public records—permitting access regardless of state citizenship and distributing the costs of access equitably among all requesters.<sup>9</sup>

### **B. Right To Reside And Purchase Property In Other States**

The rights to “pass through or to reside in any other state for the purposes of trade, agriculture, professional pursuits or otherwise” and “to acquire and possess property of every kind” are two of the oldest privileges and immunities recognized under the Clause. *Blake v. McClung*, 172 U.S. 239, 249 (1898) (internal quotation marks omitted); see also *Hicklin*, 437 U.S. at 524, 525. Virginia’s citizens-only provision infringes on

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<sup>9</sup> See, e.g., Cal. Gov’t Code § 6253; Colo. Rev. Stat. Ann. § 24-72-201; Conn. Gen. Stat. Ann. § 1-210; D.C. Code § 2-532; Fla. Stat. Ann. § 119.01; Haw. Rev. Stat. § 92F-11; Idaho Code Ann. § 9-338; Ill. Stat. ch. 5 § 140/3; Ind. Code Ann. § 5-14-3-3; Iowa Code Ann. § 22.2; Kan. Stat. Ann. § 45-218; Ky. Rev. Stat. Ann. § 61.872; La. Rev. Stat. Ann. § 44:31; Me. Rev. Stat. tit. 1, § 408; Mass. Gen. Laws Ann. ch. 66, § 10; Miss. Code. Ann. § 25-61-5; *State ex rel. Bd. of Pub. Utils. of Springfield v. Crow*, 592 S.W.2d 285, 289 (Mo. Ct. App. 1979); Mont. Const. art. II, § 9; Neb. Rev. Stat. § 84-712; Nev. Rev. Stat. Ann. § 239.010; N.M. Stat. Ann. § 14-2-1; N.Y. Pub. Off. Law § 84; N.C. Gen. Stat. Ann. § 132-6; Ohio Rev. Code Ann. § 149.43; Or. Rev. Stat. Ann. § 192.420; 65 Pa. Stat. Ann. §§ 67.102, 67.301 *et al.*; 2012 R.I. Laws Ch. 12-448 (12-H 7555A); S.C. Code Ann. § 30-4-30; S.D. Codified Laws § 1-27-1; *City of Garland v. Public Util. Comm’n of Texas*, 165 S.W.3d 814, 820 (Tex. Ct. App. 2005); Utah Code Ann. § 63G-2-201; Vt. Stat. Ann. tit. 1, § 316; Wash. Rev. Code Ann. § 42.56.080; W. Va. Code Ann. § 29B-1-3; Wis. Stat. Ann. § 19.35; Wyo. Stat. Ann. § 16-4-203.

these rights in numerous ways. A few examples illustrate the harm.

When a person relocates to another state, state and local records provide key information on where to reside and purchase property. For instance, a family relocating from California to Roanoke may want to look at the city's plan documents to determine the potential land use around a new neighborhood development. A newly-minted doctor, deciding where in the United States to set up her practice, may want to review state nursing home inspection records. An out-of-state owner of a restaurant franchise may need to look at state health inspection records.

Similarly, state and local records are vitally important to out-of-state purchasers of real property. See *Hicklin*, 437 U.S. at 524. Hurlbert himself was the proprietor of a real-estate tax assessment business and needed to get Virginia records for his clients. *McBurney*, 667 F.3d at 460. More commonly, where a developer is considering a purchase of a tract of land from a municipality, the developer needs access to local zoning records, historical property sales, and other public records. Nearly all purchasers of real property must run title searches to ensure that the property is free from encumbrances. Without any substantial justification, the Virginia FOIA discriminates against these non-residents.

These effects are exaggerated for people living close to state lines, where people often live in one state and work in another. The cities of Bristol, Virginia, and Bristol, Tennessee are good examples. They share a common downtown district, and that district's State Street also serves as the state border. Because Tennessee's open records law also limits access to its citizens,

Bristol inhabitants—on both sides of the state line—are particularly disadvantaged with respect to public records access. See Tenn. Code Ann. § 10-7-503(a)(2)(A).

### C. Right To Participate In Political Advocacy

This Court explained in *Piper* that it “has never held that the Privileges and Immunities Clause protects only economic interests.” 470 U.S. at 281 n.11. “It is discrimination ... on matters of fundamental concern which triggers the Clause, not regulation affecting interstate commerce.” *United Bldg. & Constr. Trades Council v. Mayor & Council of Camden*, 465 U.S. 208, 220 (1984). The Third Circuit, reviewing this Court’s Privileges and Immunities precedents, concluded that the Clause protects “political advocacy regarding matters of national interest or interests common between the states.” *Lee*, 458 F.3d at 200.

State and local records bear on a variety of issues of national importance, including oversight of political leaders, campaign finance, crime, health trends, and education. Many of the undersigned *amici* have used state freedom of information laws to access information bearing on these important issues.

For example, Citizens for Responsibility and Ethics, with one office in Washington, D.C., regularly requests documents under state open records laws throughout the country to investigate potential unethical behavior by political leaders.<sup>10</sup> CREW has requested documents relating to a Congressional representa-

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<sup>10</sup> See Citizens for Responsibility and Ethics in Washington, *Legal Filings—FOIA Requests*, <http://www.citizensforethics.org/legal-filings/c/foia-requests2> (last visited Aug. 28, 2012).



tive's earmarking of millions of dollars for the Florida community college where his wife works; records relating to a concert that was scheduled at the University of Central Florida Arena that formed the basis for a complaint by CREW to the FTC alleging unfair and deceptive acts and practices; and documents relating to a Wisconsin governor's practice of sending State Troopers to follow state legislators.

The Electronic Privacy Information Center has used state records to monitor both state and federal government activities, bringing to light controversial practices of national significance. EPIC's investigation of the Virginia Fusion Intelligence Center is a case in point. The Virginia Fusion Center compiles large amounts of data about citizens from public and private sources and raises substantial privacy concerns.<sup>11</sup> Remarkably, in 2008, Virginia enacted legislation exempting the state Fusion Center from state open records and privacy laws.<sup>12</sup> After state officials made statements hinting that federal agencies promoted this legislation as a condition of federal support for the program, EPIC filed Virginia FOIA requests for pertinent correspondence between the State Police and federal authorities, including the Department of Homeland Security

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<sup>11</sup> See EPIC, *EPIC v. Virginia Department of State Police: Fusion Center Secrecy Bill*, [http://epic.org/privacy/virginia\\_fusion/](http://epic.org/privacy/virginia_fusion/) (last visited Aug. 28, 2012).

<sup>12</sup> Citron & Pasquale, *Network Accountability for the Domestic Intelligence Apparatus*, 62 *Hastings L.J.* 1441, 1465 (2011), available at [http://www.hastingslawjournal.org/wp-content/uploads/2011/08/CitronPasquale\\_62-HLJ-1441.pdf](http://www.hastingslawjournal.org/wp-content/uploads/2011/08/CitronPasquale_62-HLJ-1441.pdf)



and the FBI.<sup>13</sup> The State Police withheld the documents, and EPIC successfully challenged the withholding in court. *Electronic Privacy Info. Ctr. v. Captain J. Thomas Martin et al.*, No. GV08-019225 (Va. Gen. Dist. Ct. May 8, 2008). EPIC's efforts unveiled a Memorandum of Understanding between the State Police and the FBI in which the entities committed to limit public oversight of the Center's activities.<sup>14</sup>

EPIC was able to rely on a Virginia-resident attorney and its own status as a media organization when it submitted its requests and thus was able to challenge the State Police's denial under state law. An out-of-state individual or group without these advantages, however, would have been denied access to this nationally significant information or would have had to hire a Virginian to act on its behalf, an obstacle to those individuals or organizations without in-state connections or sufficient funds and a significant home-field advantage for Virginia citizens.

Government records capable of shedding light on issues of national importance are often maintained at state and local levels. Closing these records off to citizens of other states jeopardizes "the vitality of the Nation as a single entity." *Baldwin*, 436 U.S. at 383. The

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<sup>13</sup> EPIC, Freedom of Information Act request to Virginia State Police (Feb. 12, 2008), available at [http://epic.org/privacy/fusion/VA\\_FOIA021208.pdf](http://epic.org/privacy/fusion/VA_FOIA021208.pdf).

<sup>14</sup> *Memorandum of Understanding Between the Federal Bureau of Investigation and the Virginia Fusion Center* (2008), [http://epic.org/privacy/virginia\\_fusion/MOU.pdf](http://epic.org/privacy/virginia_fusion/MOU.pdf) ("To the extent information received as a result of this MOU is the subject of or is responsive to a request for information under the Freedom of Information Act, the Privacy Act, or a Congressional inquiry, such disclosure may only be made after consultation with the FBI.").

Virginia FOIA burdens noncitizens' right to "political advocacy" and to a resource "necessary to the ability to engage in that activity"—public records. *Lee*, 458 F.3d at 200.

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As described above, citizens-only provisions cause myriad harms. Virginia cannot justify these burdens. There is no "substantial reason for the difference in treatment" to noncitizens. *Barnard v. Thorstenn*, 489 U.S. 546, 552 (1989); *see also C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 392 (1994) (holding that a state discriminating against interstate commerce must show "that it has no other means to advance a legitimate local interest"). Fees can be imposed equally on all requesters to compensate for resources spent responding to requests. *See Barnard*, 489 U.S. at 556 (holding that a discriminatory attorney residency requirement was not justified by avoiding administrative burdens because "[t]here is no reason to believe that the additional moneys received from nonresident members will not be adequate to pay for any additional administrative burden."). Indeed, as stated at a meeting of the Virginia Freedom of Information Advisory Council, "[f]orty-four states do not restrict who may make FOIA requests and there has been no clamoring for changing the law in those states."<sup>15</sup>

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<sup>15</sup> Va. Freedom of Information Advisory Council, *Report to the Government and the General Assembly of Virginia* 5-6 (2010), available at <http://leg2.state.va.us/dls/h&sdocs.nsf/6f70d2f6f7bfeb2785256e0069ba89/dfd23a3c0ba5fd4c8525769a007a2cef?OpenDocument>.

## II. INCONSISTENT ENFORCEMENT OF CITIZENS-ONLY PROVISIONS AND LACK OF OVERSIGHT COMPOUND THE HARM

States that have open records laws with citizens-only provisions do not uniformly enforce them, and the lack of clear guidelines for noncitizen requesters and records custodians compounds the harm. Noncitizens do not know what rights they have and what procedures they must follow to request records. Records custodians undermine the purpose of open records laws by deciding whether to grant a request based on its nature and source. This state of affairs magnifies the discrimination that noncitizens confront in attempting to get the same information that citizens may readily access.

Virginia agencies grant or deny noncitizen requests according to their own informal policies and whims. *See* Va. Freedom of Information Advisory Council, *supra* n.15, at 5-6. The attorneys general for Arkansas and Tennessee, which also have citizens-only provisions,<sup>16</sup> have likewise interpreted those laws as leaving the decision whether to grant noncitizens' requests for records to the whim of records custodians.<sup>17</sup> The arbitrary treatment of noncitizen requests may be magnified due to questions regarding the laws' constitutionality. *See*

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<sup>16</sup> *See* Ark. Code. Ann. § 25-19-105(a)(1)(A); Tenn. Code Ann. § 10-7-503(a)(2)(A).

<sup>17</sup> *See* Letter from Dustin McDaniel, Attorney Gen., Ark., to Billy D. Vanlandingham, Office of Pers. Mgmt., Ark. Dep't of Fin. and Admin. et al. (Feb. 10, 2012), *available at* <http://ag.arkansas.gov/opinions/docs/2012-017.html>; Tenn. Att'y Gen. Op. No. 01-132 (Aug. 22, 2001), *available at* <http://www.tn.gov/attorneygeneral/op/2001/op/op132.pdf>.

Letter from Dustin McDaniel, *supra* n.17 (“[A] custodian might reasonably decide to grant the [noncitizen’s] FOIA request in light of the Third Circuit decision.”).

Because the open government laws of Virginia, Arkansas, and Tennessee do not authorize noncitizen requests for records, their procedural safeguards would appear to govern only in-state requests. Such is the case in Virginia, where state and local agencies have developed their own inconsistent and arbitrary practices regarding how much to charge an out-of-state requester, how long to take in responding, and whether to honor the request at all. See Va. Freedom of Information Advisory Council, *supra* n.15, at 5-6. For example, some agencies “usually” honor out-of-state requests, and one processes such requests “unless the requested records are voluminous.” *Id.* at 6. The Virginia Freedom of Information Advisory Council’s report also notes that “state agencies do better with out-of-state requests than local agencies.” *Id.*

Because the Virginia FOIA does not apply to out-of-state requests, agencies are freed from any accountability for how they handle such requests. State and local agencies need not adhere to the Virginia Supreme Court’s holding, for example, that the “purpose or motivation behind a [FOIA] request is irrelevant” to the decision whether to grant it. *Associated Tax Serv., Inc. v. Fitzpatrick*, 372 S.E.2d 625, 629 (Va. 1988). The upshot is that out-of-state requesters may be given a lower priority, the reason for their requests may be factored into the processing, and, of course, their requests may not be processed at all. Unclear guidelines for out-of-state requesters produce inconsistent application of the state’s open government law and unnecessarily burden, without justification, many who seek access to public records.

## CONCLUSION

For the foregoing reasons, amici urge the Court to grant the Petition and resolve now the Circuit split regarding the constitutionality of state open records laws that, like Virginia's, have a citizens-only provision.

Respectfully submitted.

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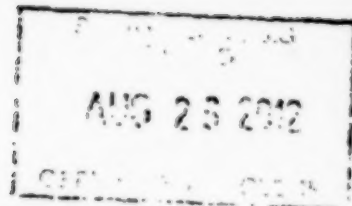
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AUGUST 2012



**AMICUS  
CURIAE  
BRIEF**



No.12-17

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In The Supreme Court of the United States

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MARK J. MCBURNEY, *et al.*,  
*Petitioners,*

v.

NATHANIEL L. YOUNG, Deputy Commissioner  
and Director, Virginia Division of Child  
Support Enforcement, *et al.*,  
*Respondents.*

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On Petition for Writ of Certiorari to the United States  
Court of Appeals for the Fourth Circuit

**BRIEF OF THE COALITION FOR SENSIBLE  
PUBLIC RECORDS ACCESS; CONSUMER DATA  
INDUSTRY ASSOCIATION; CORELOGIC; REED  
ELSEVIER INC.; NATIONAL ASSOCIATION OF  
PROFESSIONAL BACKGROUND SCREENERS;  
THE SOFTWARE & INFORMATION INDUSTRY  
ASSOCIATION; NATIONAL CREDIT REPORTING  
ASSOCIATION; NATIONAL MULTIFAMILY  
RESIDENT INFORMATION COUNCIL; AND POLK  
AS *AMICI CURIAE* IN SUPPORT OF PETITIONER**

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## IDENTITY OF THE *AMICI*

*Amici* or their members (collectively, "*amici*") compile public records for an array of important commercial and public services. Through the efforts of their employees and the implementation of digital technology, *amici* aggregate, index, and supplement public record data produced and maintained by state governments. The value that *amici* add dramatically distinguishes *amici*'s products and services from the raw information available directly from governmental agencies. These enhancements enable individuals, public authorities, businesses, news agencies and consumers to save time and money by allowing them to search through otherwise impenetrable masses of official information. The *amici* are:

- The Coalition for Sensible Public Records Access (CSPRA) is a nonprofit organization dedicated to promoting open public records access for consumers and businesses.

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<sup>1</sup> Communications indicating the intent to file this *amici curiae* brief were received by the counsel of record for all parties at least 10 days prior to the due date for this *amici curiae* brief. All parties consent to the filing of this brief. The *amici* affirm that no counsel for a party authored this brief in whole or in part and neither a party nor counsel for a party has made a monetary contribution intended to fund its submission.

- **The Consumer Data Industry Association (CDIA)** is an international trade association that represents some 200 consumer data companies that engage in credit reporting, mortgage reporting, check verification, fraud prevention, risk management, employment reporting, tenant screening and collection services. Most of them rely on public records acquired under state public records laws.
- **CoreLogic** provides financial and property information, analytics and services to business and government. It has built one of the largest and most comprehensive U.S. real estate, mortgage application, fraud, and loan performance databases. Its databases includes the records of over 787 million historical property transactions, over 93 million mortgage applications and property-specific data covering over 99% of U.S. residential properties.
- **Reed Elsevier Inc.'s LexisNexis** division provides access to the public records of all fifty states. These records include property title records, liens, tax assessor records, criminal history information, and other information kept by state governments Lexis Nexis uses this information to create tools that combat identity theft, screen employees and prevent fraud, and assist law enforcement.

- **The National Association of Professional Background Screeners' (NAPBS)** membership consists of over 700 employment and tenant background screening firms that search publicly available state criminal background information to provide employers and the managers of apartment buildings in every state with accurate information about the people they employ and to whom they let space.
- **The Software & Information Industry Association (SIIA)** represents approximately 600 member companies, among them publishers of software and information products, including databases, enterprise and consumer software, and other products that combine information with digital technology. Many of its members rely on access to public records.
- **The National Credit Reporting Association (NCRA)** is a national trade organization of consumer reporting agencies and associated professionals that provide products and services to credit grantors, employers, landlords and all types of general businesses. NCRA's membership includes four of five mortgage credit reporting agencies in the United States that can produce a credit report meeting Fannie Mae, Freddie Mac and HUD requirements for mortgage lending.

- **The National Multifamily Resident Information Council (NMRIC)** is a not-for-profit association of leading resident screening companies that rely on access to public records from all states to provide qualifying background information on residents seeking housing, a significant percentage of whom have backgrounds in multiple states.
- **Polk**, a division of R.L. Polk & Co., specializes in providing information for the automotive and related industries, and relies on information supplied by state governments under their public records laws and other statutes. Polk uses this information to help customers understand their market position, identify trends, build brand loyalty, and ensure consumer safety. Its CARFAX Vehicle History Reports are routinely used by millions of consumers each year, and are available on all used cars and light trucks model year 1981 or later.

## **INTRODUCTION AND SUMMARY OF ARGUMENT**

*Amici* agree with petitioners that access to public records under a state Public Records Act is a privilege of citizenship within the meaning of Article IV section 2 of the Constitution, and that a state needs a strong justification (which is absent in this case) for granting the privilege to state citizens while denying the privilege to citizens of other states.



*Amici* also agree with petitioners that the business of collecting, aggregating, indexing, and creating new services from public records is interstate commerce. A state statute that discriminates against out-of-state businesses engaged in the same pursuits as their in-state counterparts discriminates against interstate commerce in violation of the dormant commerce clause of Article I, section 8 of the Constitution.

The Fourth Circuit's opinion licenses *every* state to discriminate against out-of-state public records requestors, and it is through that lens that the decision should be viewed. The lower court failed to appreciate that the effect of Virginia's statute on Hurlbert and *amici's* commercial activities and the customers they serve is more than "incidental." *McBurney v. Young*, 667 F.3d 454, 464-65 (4th Cir. 2012). By *banning* access by out-of-state companies and individuals to public records, statutes like Virginia's would disrupt this national information market, hamstringing significant federal statutory regimes, and adversely interfere with a number of important commercial and government activities. *Amici* submit this brief to explain the adverse impact that the Fourth Circuit's ruling will, unless it is reversed, have on the large nationwide marketplace for public-record information.

**I. *Amici* Are Involved in a Robust, Competitive Interstate Information Market that Creates Important Societal Benefits.**

“So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed.” *Va. Pharmacy Bd. v. Va. Consumer Council*, 425 U.S. 748, 765 (1976).

Public records are the essence of *amici*’s business and inform transactions in numerous fields of endeavor. All fifty states and the District of Columbia have public records laws, and *amici* rely on those laws for access to the public records used by their services. *See generally Open Government Guide*, (Gregg Leslie & Mark Caramanica eds., The Reporters Committee for the Freedom of the Press 6th ed. 2011), *available at* <http://www.rcfp.org/open-government-guide> (describing the public records laws of the fifty states and the District of Columbia).

Requests for and receipt of public record information under state freedom of information laws represent a daily occurrence, and the lifeblood of *amici*’s commercial activity. Like the petitioner Hurlbert, *amici* routinely collect public record information from states in which they neither reside nor have a principal place of business. They do so by

means ranging from in-person visits to clerks' offices and courthouses to remote electronic access over the Internet. *Amici* then organize, index and compile that information into paper and electronic services and publications with regional or nationwide scope. Real estate financing, credit reporting, background checks, tenant screening, and even political campaigns all rely to some degree on access to state public records of the several states. Public entities, including housing authorities, law enforcement and intelligence agencies, rely on access to state public-record information to perform their government duties.

*Amici* come in all shapes and sizes; some are small organizations; some are multi-billion dollar corporations. Some maintain national databases of public record information, while others make discrete requests for public records held by jurisdictions around the country—as Petitioner Hurlbert did in this case. Nonetheless, they all share two things in common: (1) nondiscriminatory access to public records nationwide is the *sine qua non* of their businesses; and (2) customers value and depend upon their publications because of their thoroughness and accuracy.

*Amici's* publication of public record information satisfies an essential need of modern commercial and political life. The information they provide lays the foundation for transactions in a wide variety of markets, and ensures transparency

and efficiency in those markets. *Amici's* efforts to sort, collect, and analyze public records enables sellers to determine whether a potential home buyer is qualified, an employer to determine whether a suspect has convictions in multiple jurisdictions, or an insurer to determine what the rate of insurance on a particular property should be. Many of *amici's* services are targeted at particular spheres of commercial activity.

Thus, although the market for public record information is national in scope, there is no monolithic "public records industry." For example, many of *amicus* CDIA's members acquire public records information for the purpose of evaluating consumer credit—whether for purchasing a car, opening a business, or determining a credit card interest rate. Those extending credit may want to know what real estate the borrower holds, whether the borrower faces any tax liens, or if he or she had recently declared bankruptcy.

The use of these records goes well beyond credit transactions. For example, *amicus* Reed Elsevier's Accurint service routinely provides fraud prevention tools to financial and retail institutions. Thus, when authenticating an oral request to transfer funds from a bank account, a financial institution will ask questions that the thief of a wallet would probably not be able to answer, such as "Which of the following five addresses is a past home address of yours?" or "Which of the following cars did

you once own?" The answers to these questions would be found in state real property records or Uniform Commercial Code filings.

The nationwide availability of this information also helps make markets in products and services more competitive. *Amicus* SIIA's members include "construction plan rooms" that are dedicated to assembling documents relating to construction projects. When a state decides that it wants a new school built, it will accept bids and plans. Those plans, bids, and related specifications become public records, which plan rooms around the country lawfully obtain and take to a central location to be viewed by subcontractors wishing to bid on part of the project (air conditioning, electrical work, plumbing, etc.). Thanks to digital technology, where once plan rooms had to have a physical presence in a given state, they can now offer these plans and specifications to their subscribers nationwide. A local county in Illinois can receive competitive bids on air conditioners from California, water coolers from Wisconsin, and plumbing services from New Jersey. The enhanced competition between bidders results in better pricing for these public entities, and a more efficient use of tax dollars.

Similarly, Polk, the parent company of Carfax ([www.carfax.com](http://www.carfax.com)), provides a variety of automotive information to manufacturers and consumers that it obtains from state governments subject to the Driver's Privacy Protection Act of 1994, 18 U.S.C. §



2721 *et seq.*, as well as public records laws. Carfax uses that information to provide consumers and dealers with a vehicle's accident history, informing customers whether they are buying a potential "lemon." Polk also combines title information with other state records to help manufacturers notify individual consumers in the event of a safety recall.

Nondiscriminatory access to public records also enhances public safety. Members of *amicus* NAPBS acquire and aggregate public records for the purpose of employment background checks. Some of its members travel to a courthouse or other public records repository in a neighboring jurisdiction to obtain criminal records. A small business in one state may check databases and visit courthouses, and check other records in other states to ensure that a day care worker has not been convicted of a crime involving minors. Other NAPBS members aggregate data electronically, and match individuals to criminal records using cross-identifiers such as social security numbers, last known addresses, and other information in order to ensure that the employer receives a full picture of the applicant's relevant past.

The private sector is not alone in its reliance on public record information. The federal government relies on *amici's* state-held public records for various purposes, including law enforcement. For example, LexisNexis' databases have been used for years by the FBI:

Subscription to these [LexisNexis and other] databases allows FBI investigative personnel to perform searches from computer workstations and eliminates the need to perform more time consuming manual searches of federal, *state*, and local records systems, libraries, and other information sources. Information obtained is used to support all categories of FBI investigations, from terrorism to violent crimes, and from health care fraud to organized crime.

*Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations for Fiscal Year 2000: Hearings on H.R. 2670/S.1217 Before Subcomm. for the Dep'ts of Commerce, Justice, and State, the Judiciary, and Related Agencies of the S. Comm. on Appropriations, 106th Cong. 280 (1999) (emphasis added), available at <http://www.gpo.gov/fdsys/pkg/CHRG-106shrg54206/pdf/CHRG-106shrg54206.pdf>.<sup>2</sup>*

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<sup>2</sup> LexisNexis' relationship with the FBI continues to this day, and since 9/11, the comprehensiveness and utility of these information tools have become even more critical to law enforcement authorities. "[W]e often get more accurate data from the commercial sector. In addition, the processes by which government agencies manage data often makes it difficult to acquire and needs [a] great deal of labor intensity

On the local level, governments use real estate records like those in this case to detect tax avoidance. Delaware County, Indiana recovered over \$1.5 million in new revenue due to homestead exemption fraud.<sup>3</sup> An audit assisted by LexisNexis' electronic databases of public records revealed that owners claiming Indiana as a principal residence in

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into making it usable and accessible to other entities." The Privacy Office, Department of Homeland Security, Official Workshop Transcript, *Privacy and Technology Workshop: Exploring Government Use of Commercial Data for Homeland Security*, Panel One: How are Government Agencies Using Commercial Data to Aid in Homeland Security? at 9 (Sept. 8-9, 2005) (transcription commas omitted) (comments of Grace Mastalli Principal Deputy Director for the Information Sharing and Collaboration Program at DHS), available at [http://www.au.af.mil/au/awc/awcgate/dhs/privacy\\_wkshop\\_panel11\\_sep05.pdf](http://www.au.af.mil/au/awc/awcgate/dhs/privacy_wkshop_panel11_sep05.pdf). That reliance extends to the states as well. See Brief of the State of Texas as *Amicus Curiae* in Support of Defendants at 2-3, *Taylor v. Acxiom Corp.*, 612 F.3d 325 (5th Cir. 2010) (Nos. 08-41083, 08-41180, 08-41232) (The "[Texas] Attorney General's Office routinely uses national databases provided by private resellers to track down individuals who are delinquent in their child-support payments, as well as to help locate suspects in the course of conducting consumer protection and criminal investigations. Plaintiffs' theory of liability would not just drive these resellers out of business—it would eliminate a valuable tool of law enforcement.").

<sup>3</sup> Indiana law permits taxpayers certain deductions for their primary residence. See Ind. Code §§ 6-1.1-12-37(a)(1), -37(a)(2), -37(c) (describing deduction).

fact were claiming multiple homestead exemptions across multiple states.<sup>4</sup>

The above activities represent just a fraction of the daily uses that are made from state public records.<sup>5</sup> If the Fourth Circuit's opinion is left not reviewed, data will be missing from information services that aid criminal investigators, detect fraud and government waste, screen the criminal

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<sup>4</sup> Press Release, LexisNexis, LexisNexis and Tax Management Associates Identify Fraud and Discover Nearly \$1,500,000 in New Revenue for Delaware County, Indiana (Feb. 27, 2012), *available at* <http://www.lexisnexis.com/risk/newsevents/press-release.aspx?id=1330361634905478>. On the federal level, LexisNexis products are used by the United States Department of Health and Human Services, and their state government analogs to detect Medicare and Medicaid fraud by matching requests for payment against licensure records and other information acquired from public records.

<sup>5</sup> Other uses include enforcing child support obligations. For example, the Association for Children for Enforcement of Support reports that public record information provided through commercial vendors helped locate over 75 percent of the "deadbeat parents" they sought. Comments of Gail H. Littlejohn, Vice President, Government Affairs, and Steven M. Emmert, Director, Government Affairs, Reed Elsevier Inc., LEXIS-NEXIS Group (Mar. 31, 2000), *available at* <http://www.sec.gov/rules/proposed/s70600/littlejl.htm>; *see also Financial Information Privacy Act: Hearings on H.R. 4321 Before the H. Comm. on Banking and Financial Services*, 105th Cong. 100 (1998) (statement of Robert Glass).

background of employees, and give certainty to commercial transactions.

## **II. Leaving the Fourth Circuit's Decision Unreviewed Threatens the Continued Efficacy of the National Marketplace for Public Record Information**

Prior to the Fourth Circuit's decision below, no court had upheld citizen-only access to public records, and the only federal appellate court to consider the issue struck down such state discrimination against non-citizens.<sup>6</sup> *Amici* fear that those states with comparable laws will enforce them in ways that will destroy the *amici's* national services,<sup>7</sup> and other states without such statutes will be emboldened to enact parallel prohibitions or devise other restrictions that deter access to non-citizens, such as barring commercial use of public records by non-citizens or increasing fees for access to records by out-of-staters.

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<sup>6</sup> E.g., *Lee v. Minner*, 458 F.3d 194 (3d Cir. 2006).

<sup>7</sup> E.g., *Jones v. City of Memphis*, No. 10-2776-STA-dkv, 2012 U.S. Dist. Lexis 51026, at \*57 (W.D. Tenn. Apr. 11, 2012) (upholding citizens-only provision continued in Tenn. Code Ann. §10-7-503). It is *amici's* understanding that in addition to Virginia and Tennessee, two other states have their own citizen-only provisions: Arkansas, Ark. Code Ann. § 25-19-105(a)(1)(A), and New Jersey, N.J. Stat. Ann. 47:1A-1.



As mentioned above, *amici* get access to information in multiple ways. Rather than make repeated requests, some *amici* may enter a monthly subscription arrangement with particular states. See, e.g., Mich. Comp. Laws § 15.233 (permitting subscription access that is valid up to 6 months and is renewable). Others may simply make recurring requests for the same data on a periodic basis. Still others, depending on the nature of the information sought, may have to visit a courthouse or other repository and seek access to particular records about a particular person. Virginia's statute thwarts all of these methods of access by non-Virginia companies.

Faced with this statutory bar, only two options remain—neither of which is feasible for the *amici*. First, a non-citizen could cease to do business in Virginia altogether—as Petitioner Hulbert elected to do—thereby creating gaps in formerly comprehensive products. In the alternative, a non-citizen could hire a Virginia “citizen” to gain access to the records. As discussed in more detail below, hiring state resident “strawmen” is impractical for many businesses, and cannot substitute for the current nondiscriminatory environment that *amici* currently enjoy.

**A. Upholding Discrimination Against Non-Citizens' Access Will Diminish the Value of National Databases of Public Record Information and Inhibit the Activities of Aggregators Who Regularly Make Specific Public Record Requests**

The harm that flows from citizens-only public records statutes is straightforward. For example, when information from citizens-only states is excluded, individuals will obtain employment in situations where prudence dictates they should not—whether as a pedophile in a day care center, or as an embezzler in an accounting firm.<sup>8</sup> Law

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<sup>8</sup> Given the large numbers of people who move each year, the need for geographically comprehensive background checks cannot be overstated. In 2008-09, for example, 6.9 million people moved from one state to another. U.S. Census Bureau, U.S. Dep't of Commerce, P20-565, *Geographical Mobility: 2008 to 2009* (2011), available at <http://www.census.gov/prod/2011pubs/p20-565.pdf>. Criminals are no different: in one examination of a Department of Justice program in which applicants for volunteer positions were subject to background screening, it was revealed that 41 percent of recidivists had committed a crime in a different state from the one in which they applied for a position, and over half of those with criminal histories lied about their existence when asked. S. 645, 112th Cong. § 2(10) (2012); see also *Talking Points: The Child Protection Improvements Act*, MENTOR (Sept. 2010), [http://www.mentoring.org/downloads/mentoring\\_1279.pdf](http://www.mentoring.org/downloads/mentoring_1279.pdf).

enforcement officers will waste investigation time collecting information that *amici* once regularly made available. Tax cheats like those identified by Indiana will escape with their ill-gotten gains intact. And parties to potential business transactions will be unable or unwilling to close deals because of the unavailability of desired information.

Citizen-only laws will also frustrate the policy goals of the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681 *et seq.* Congress enacted the FCRA to develop “reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information . . . .” 15 U.S.C. § 1681(b). “Those who extend credit or insurance or who offer employment have a right to the facts they need to make sound decisions,” and consumer reporting agencies (CRAs) fulfill this vital economic role. *See* S. Rep. No. 91-517, at 2 (1969).

In general terms, the FCRA regulates those businesses that sell information about consumers for specified purposes, including insurance, credit, and employment, and sets the terms under which such information (including public record information) can be used. *See* 15 U.S.C. § 1681a(d), (f) (defining consumer report and consumer reporting agency, respectively). The entire statute, including its requirement that CRAs have reasonable procedures designed to ensure the “maximum possible accuracy” of consumer information, *see id.* § 1681e(b), rests in large part on the assumption that consumer

reporting agencies have access to state public records.<sup>9</sup>

For example, if a consumer disputes the accuracy of information in a consumer report (such as the existence of a personal bankruptcy) the consumer reporting agency is required to re-investigate and verify the information within 30 days. *Id.* § 1681i(a)(1)(A). If the information is incorrect, even if a middleman supplied the information, those consumer reporting agencies that do nationwide reporting are required to “implement an automated system through which furnishers of information to that consumer reporting agency may report the results of a reinvestigation that finds incomplete or inaccurate information in a consumer’s file to other such consumer reporting agencies.” *Id.* § 1681i(a)(5)(D).

The national system of information commerce that the FCRA envisions simply would not work against the Balkanized access regime contemplated

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<sup>9</sup> See, e.g., 15 U.S.C. §§ 1681c (a)(1)-(3) (limiting usage of public records such as bankruptcies, civil judgments, arrests, convictions, and tax liens); *id.* § 1681k(a)(2), (assuming that matters of public record are “considered up to date if the public record status of the item at the time of the report is reported”); *id.* § 1681a(p)(1) (maintaining public records as part of definition of nationwide consumer reporting agency); *id.* § 1681l (maintained with respect to certain reporting activity).

by the Fourth Circuit decision. At a minimum, FCRA-required re-investigations will be considerably more difficult to perform on a nationwide or timely basis, as CRAs will be limited to acquiring information in those states in which they enjoy corporate citizenship. While larger members might be able to hire agents in individual states (depending on how such statutes are construed), the burden of re-investigation weighs more heavily on smaller entities, who may simply not report information from Virginia sources, as the petitioner has elected to do. All of these factors negatively impact consumers, who will have to wait longer to resolve pending issues in their credit history.

**B. For *Amici*, Obtaining Agents in Each State is an Infeasible Means of Doing Business.**

The state may argue that *amici* can hire agents in each state to obtain the records for them. It is both impractical (and unnecessarily burdensome) for Virginia to expect national businesses to hire “citizen requestors” in every state.

First, as the petition correctly notes, the mere presence of the citizens-only requirement confers a material advantage to public records businesses located in Virginia over those located out-of-state. (See Pet. at 26 (citing *C & A Carbone v. Town of Clarkstown, N.Y.*, 511 U.S. 383 (1994)); see also *Minner*, 458 F.3d at 200 (rejecting the burden of



having to hire an agent as “insubstantial”). For example, amicus NCRA is aware of only one Virginia entity that Fannie Mae and Freddie Mac recognize as meeting their underwriting standards in the production of credit reports.<sup>10</sup> If the Fourth Circuit decision is not reversed, similar entities (eighty percent of which are *amicus* NCRA members) now lack access to public records affecting Virginia consumers.

Second, hiring in-state agents to acquire information threatens standard processes that enable efficient nationwide operation. National financial institutions rely on *amici* like CoreLogic to provide them with a complete file of public information such as tax assessments, mortgage deeds, assignments, and lien releases on properties

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<sup>10</sup> See, e.g., *Credit Reporting Companies and Technical Affiliates*, Freddie Mac, (last visited Aug. 2, 2012) (listing approved entities), <http://www.loanprospector.com/about/crc.html>; see also *Credit Information Providers*, Fannie Mae, (last refreshed Aug. 2, 2012) (indicating one VA approved entity with two separate sponsors), <https://www.efanniemae.com/sf/refmaterials/creditproviders/index.jsp?sort=allByName>. See generally Fannie Mae, *Selling Guide: Fannie Mae Single Family* 438-46 (2012) (explaining the requirements, types, and accuracies that agencies must provide in credit reports), available at <https://www.efanniemae.com/sf/guides/ssg/sg/pdf/sel062612.pdf>.

nationwide.<sup>11</sup> The economies of scale in CoreLogic's standard and centralized acquisition processes permit its customers to gain access to relevant information in a timely, cost-effective fashion, and minimize the risk between the time when a snapshot of a property's status is taken, and the status of the property when the sale or loan actually closes.

Requiring national entities to hire people in every state jeopardizes these processes, and imposes "an artificial rigidity on the economic pattern of the industry." *Toomer v. Witsell*, 334 U.S. 385, 403-04 (1948). First, the additional cost of hiring and training new employees would pass through to consumers, making the underlying transaction more expensive. Second, the addition of more staff in each state would destroy the efficiencies in a nationwide business. Gains in accuracy that standardized and centralized national collection of data enables would be threatened. Moreover, any delays caused by fractured corporate citizenship requirements will lead to larger "gaps" between the period when assessment, title, and similar information is examined, and the time at which the loan closes,

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<sup>11</sup> See, e.g., *Real Estate, About Us, Data*, CoreLogic, (last visited Aug. 2, 2012), <http://www.corelogic.com/about-us/data.aspx#container-RealEstate>; *Mortgage, About Us, Data*, CoreLogic, (last visited Aug. 2, 2012), <http://www.corelogic.com/about-us/data.aspx#container-Mortgage>.

during which new liens or other encumbrances may appear. See J. Alex Heroy, *Comment, Other People's Money: How a Time Gap in Credit Reporting May Lead to Fraud*, 12 N.C. Bank. Inst. 321, 323 (2008). That risk will be priced into the transactions, and will result in (a) higher costs to consumers; and (b) higher risks in certain types of mortgage backed securities. In individual cases, these risks may be small, but when those risks are aggregated over large numbers of transactions, significant harm and uncertainty can result.

### **C. There is No Justification for the State's Discrimination**

The nature of the exemptions in the Virginia statute vitiate whatever justifications the state might claim for its enactment. Virginia's Freedom of Information Act denies public records access to all noncitizens unless they are (1) a newspaper or magazine located or circulated in the state; or (2) a television broadcaster broadcasting in or into the state. See Va. Code Ann. § 2.2-3704(A). Thus, on its face, the statute immunizes (1) in-state entities like *amici* and (2) in-state and certain out-of-state media outlets from the reach of the citizen-only bar.

Presumably, Virginia's enactment of this provision recognizes that permitting these entities to access public records and inform Virginia's public advances legitimate public interests. See *McBurney*, 667 F.3d at 459. Neither the state nor the lower

court, however, explained how in-state entities advance those interests and out-of-state entities do not. Like their in-state counterparts, *amici* also inform members of the Virginia and national public of matters of importance, including potential fraud, the criminal history of a potential employee or the presence of a sex offender in a given community—yet the statute inexplicably treats them differently.<sup>12</sup> The exemption's haphazard scope illustrates the unreasonableness of the discrimination against non-

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<sup>12</sup> For example, real estate recording statutes exist to put the world on notice that the person named in the deed in fact owns Blackacre. *See generally* D. Barlow Burke, *Law of Title Insurance* § 5.01 [C] (3d ed. 2000 & Supp. 2004) (describing the manner and extent to which title insurance policies rely on presumptions of notice in determining coverage of public record). Under Virginia law (and the law of other states), those facts found in a recorded real estate document are presumed to be true, and that presumption is as binding on nonresidents as it is on residents. *See, e.g., Cuthrell v. Camden Cnty.*, 118 S.E.2d 601, 604 (N.C. 1961) (describing purchaser's duty to examine title record); *Equity Bank, SSB v. Chapel of Praise A.L.D.C.M., Inc.*, No. 06-0460-CG-B, 2007 U.S. Dist. LEXIS 56086, at \*13-\*14 (S.D. Ala. July 31, 2007) (noting that Alabama law imparts constructive notice of real estate records to purchasers); Cal. Civil Code § 1213 (statutory presumption of constructive notice); Ohio Rev. Code Ann. §§ 5310.02-5310.03 (providing, respectively, that recorded documents determine priority of claims and shall be conclusive proof of facts stated therein if title is acquired in good faith). An out of state business that publishes such information performs the same function as its in-state counterpart, and should be permitted to access public records in an identical fashion.

citizens embodied in the Virginia statute, and that distinction is not countenanced by either the Privilege and Immunities or dormant Commerce Clause.<sup>13</sup>

In short, no legitimate reason for Virginia's discrimination exists. By validating that discrimination, the Fourth Circuit decision has threatened an important tool of national commerce.

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<sup>13</sup> Cf. also *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2666 (2011) (suggesting that “a restriction upon access that *allows* access to the press . . . but at the same time *denies* access to persons who wish to use the information for speech purposes, is in reality a restriction on speech.” (quoting *L.A. Police Dep’t. v. United Reporting Publ’g Corp.*, 528 U.S. 32, 42 (1999) (Scalia, J., concurring))).



## **CONCLUSION**

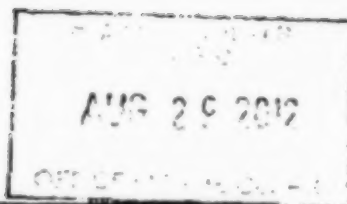
**For the foregoing reasons, the petition for certiorari should be granted.**

**Respectfully submitted,**

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August 2012**

**AMICUS  
CURIAE  
BRIEF**

No. 12-17



IN THE  
Supreme Court of the United States

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Mark J. McBurney, *et al.*,

*Petitioners,*

v.

Nathaniel L. Young, Deputy Commissioner  
and Director, Virginia Division of Child  
Support Enforcement, *et al.*,

*Respondents.*

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On Petition for a Writ of Certiorari to  
the United States Court of Appeals  
for the Fourth Circuit

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**BRIEF OF AMICI CURIAE  
JUDICIAL WATCH, INC. AND  
ALLIED EDUCATIONAL FOUNDATION  
IN SUPPORT OF PETITIONERS**

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## INTEREST OF THE *AMICI CURIAE*<sup>1</sup>

Judicial Watch, Inc. ("Judicial Watch") is a not-for-profit, educational foundation that seeks to promote integrity, transparency, and accountability in government and fidelity to the rule of law. In furtherance of its public interest mission, Judicial Watch regularly requests access to public records of federal, state, and local government agencies and officials and disseminates its findings to the public. In addition, Judicial Watch regularly files *amicus curiae* briefs and has appeared as an *amicus curiae* in this Court on a number of occasions.

The Allied Educational Foundation ("AEF") is a not-for-profit, charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study. AEF regularly files *amicus curiae* briefs as a means to advance its purpose and has appeared as an *amicus curiae* in this Court on a number of occasions.

As demonstrated in the petition for a writ of certiorari, there is a split between the U.S. Courts of Appeal for the Third and Fourth Circuits as to whether the right of access to public records is a "privilege and immunity" under the U.S. Constitution. Whereas the Third Circuit held that the right of access to public records is a common law right

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<sup>1</sup> Pursuant to Supreme Court Rule 37.6, *Amici Curiae* state that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *Amici Curiae* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties have consented to the filing of this brief; letters reflecting this blanket consent have been filed with the Clerk.

that furthers a vital national economy, the Fourth Circuit disagreed. The Fourth Circuit's ruling, which is at issue in this matter, dismissed the importance of the right of access to public records and concluded that, even if such a right exists, it does not bear upon the vitality of the Nation as a single entity.

As educational foundations, *Amici* are concerned that if the Fourth Circuit's opinion is not overturned, a valuable weapon in their arsenal will be weakened, if not, lost entirely. The ability of organizations and individuals such as *Amici* to seek access to public records of any state is vital to them furthering their public interest missions. In this brief, *Amici* intend to present the history of the right of access to public records as well as how *Amici* recently used this right. In doing so, *Amici* seek to help demonstrate that the right of access to public records is basic to the maintenance and well-being of the country. Because the right of access to public records bears upon the vitality of the Nation as a single entity, the petition for a writ of certiorari should be granted so that all persons have the right to request public records from all states.

### SUMMARY OF THE ARGUMENT

The "Privileges and Immunities Clause" of Article IV of the U.S. Constitution protects basic rights bearing upon the vitality of the Nation as a single entity. One such right is the right of access to public records. Since the founding of the nation, courts have recognized the right of the people to gain access to and inspect the public records of local governments. However, just because the requested records

have been or may be those of a city, county, or state government does not mean such records are only of local importance and value. The inspection of public records of city, county, and state governments are relevant to and often shed light on the policies and activities of the federal government. Sometimes, gaining access to local records is the only way to fully understand the actions of the federal government. In addition, many policy decisions or activities of local governments are being debated or implemented in other localities across the Nation. Therefore, the right of access to a public record not only sheds light on local government, but it also bears upon the vitality of the Nation as a single entity.

## ARGUMENT

### I.     **The “Privileges and Immunities Clause” Protects the Rights of All Citizens of Free Governments.**

Article IV, Section 2 of the United States Constitution states, “The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.” The clause, commonly referred to as the “Privileges and Immunities Clause” or the “Comity Clause,” was intended to “fuse into one Nation a collection of independent, sovereign States.” *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 279 (1985) (quoting *Toomer v. Witsell*, 334 U.S. 385, 395 (1948)). To date, the Court has not definitively designated what constitutes “privileges and immunities.” However, it has interpreted the clause at various times through the years. In the *Slaughter-House Cases*, the Court adopted the



analysis found in *Corfield v. Coryell*, 6 F. Cas. 546 (CC ED Pa. 1825). 83 U.S. 36, 76 (1873). Specifically, the Court reiterated:

The inquiry . . . is, what are the privileges and immunities of citizens of the several States? We feel no hesitation in confining these expressions to those privileges and immunities which are fundamental; which belong of right to the citizens of all free governments, and which have at all times been enjoyed by citizens of the several States which compose this Union, from time of their becoming free, independent, and sovereign.

*Slaughter-House Cases*, 83 U.S. at 76 (quoting *Corfield*, 6 F. Cas. at 551). In addition, the Court explained that the court in *Corfield* found that the “privileges and immunities” were

those rights which are fundamental. Throughout [the] opinion, [“privileges and immunities”] are spoken of as rights belonging to the individual as a citizen of a State. . . . And they have always been held to be the class of rights which the State governments were created to establish and secure.

*Slaughter-House Cases*, 83 U.S. at 76.

In *Baldwin v. Fish and Game Commission of Montana*, 436 U.S. 371 (1978), the Court held that the state of Montana could charge nonresidents higher fees to obtain an elk-hunting license than it

charged residents of Montana to obtain the same license. In doing so, the Court explained that states may treat residents and nonresidents differently; however, some distinctions “are prohibited because they hinder the formation, the purpose, or the development of a single Union of those States.” *Baldwin*, 436 U.S. at 383. In other words, the Court stated that the “Privileges and Immunities Clause” protects those rights “bearing upon the vitality of the Nation as a single entity.” *Id.*

The Court recently affirmed this interpretation and expounded that the Court “has never held that the Privileges and Immunities Clause protects only economic interests.” *Piper*, 470 U.S. at 281. At issue in *Piper* was whether the state of Vermont could restrict bar admissions to state residents only. *Id.* at 275. In holding that such a restriction violated the “Privileges and Immunities Clause,” the Court stated:

We believe that the legal profession has a noncommercial role and duty that reinforce the view that the practice of law falls within the ambit of the Privileges and Immunities Clause. Out-of-state lawyers may – and often do – represent persons who raise unpopular federal claims. In some cases, representation by nonresident counsel may be the only means available for the vindication of federal rights. The lawyer who champions unpopular causes surely is as important to the maintenance or well-being of the Union.

*Id.* at 281 (internal citations omitted). In other words, in some instances, only nonresidents will challenge the policy decisions or activities of local governments.

## II. The Right of Access to Public Records Is a Well-Recognized Common Law Right.

As the Court has previously declared, "It is clear that the courts of this country recognize a general right to inspect and copy public records and documents." *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978). In addition, the United States Court of Appeals for the District of Columbia Circuit has also stated that "the right of access" exists "in the common law of the states." *Washington Legal Foundation v. U.S. Sentencing Commission*, 89 F.3d 897, 903 (D.C. Cir. 1996). In other words, the right of access to public records applies not only to public records of the federal government but also public records of state governments.

For over 100 years, state courts have recognized the common law rule that "every person is entitled to the inspection of" public documents. *State v. Williams*, 41 N.J.L. 332, 334 (N.J. 1879); *see also* *Burton v. Tuite*, 78 Mich. 363, 374 (1889) ("I do not think that any common law ever obtained in this free government that would deny the people thereof the right of free access to, and public inspection of, public records."). Significantly, in 1891, the Virginia Supreme Court held, "At common law, the right to inspect public documents is well defined and understood." *Clay v. Ballard*, 87 Va. 787, 791 (1891).

Although much of the concern of the courts focused on whether a citizen had a private, individualized interest in the requested records, case law also illustrates the importance of the right of access to public documents for the general good. For example, in 1900, an individual requested access to the public records of the auditor's office in a town of Indiana for the purpose of "discovering whether the money and property of the county had been duly accounted for by the persons and officers charged with the collection and disbursement of the same." *State v. King*, 154 Ind. 621, 622 (1900). The town auditor refused to provide access to public records because, he asserted, the requester did not have a personal interest in the requested records. The court rejected that argument. In ordering the town auditor to provide access to the requested records, the court stated, "The general rule which obtained at common law was that every person was entitled to an inspection of public records, by himself or agent, provided he had an interest in the matters to which such records related." *Id.* at 625. In addition, the court held that a person's interest "to discover the condition of the public . . . to ascertain if the affairs of his county have been honestly and faithfully administered by the public officials charged with that duty" is completely appropriate. *Id.* In other words, the right of access to public records is grounded in the public's right to know "what the government is up to." *U.S. Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 800 (1989).

In 1928, the Michigan Supreme Court again examined the common law right of access to public records and the origin of that right. In doing so, it

noted, "If there be any rule of the English common law that denies the public the right of access to public records, it is repugnant to the spirit of our democratic institutions. Ours is a government of the people." *Nowack v. Auditor General*, 234 Mich. 200, 203 (1928). In addition, the court stated, "There is no question as to the common-law right of the people at large to inspect public documents and records." *Id.* at 204. Moreover, it reinforced the notion that the common law right "to inspect public records" includes those circumstances when a person's interest is solely that "as a member of the general public." *Id.*

In the last 60 years, state legislatures have enacted statutes addressing the right of access to public records. However, the statutory right does not narrow or displace the common law right of access. Courts continue to recognize "the right to an examination of public records, either under statutory grant or on common law principles." *Wiley v. Woods*, 393 Pa. 341, 346 (1958).

As demonstrated above, the right of access to public records is nothing new. In fact, the basic right to inspect public records has played an important role in the maintenance of democracies in local governments since the founding of the individual states as well as the Nation. As the former Chief Justice of the Ohio Supreme Court expressed:

The public availability of government information has long been recognized as a fundamental tenet upon which democratic theory rests. This principle, venerated by the founding fathers and later



codified by state legislatures, has its foundation in the common-law courts of England. . . . The common-law right to inspect government documents has been recognized in Ohio since the earliest reported court decisions. As there was no statutory provision to the contrary (and no constitutional mandate), the right to inspect public records was subject only to the condition that the inspection did not endanger the safety of the record or unreasonably interfere with the duties of the public official having custody of the record. These early Ohio cases, like those of other jurisdictions, recognized that public records were available for inspection regardless of whether an individual had a private interest in the record.

Thomas J. Moyer, *Interpreting Ohio's Sunshine Laws: a Judicial Perspective*, 59 N.Y.U. ANN. SURV. AM. L. 247, 247-248 (2003). In other words, the right of access to public records is a basic right of all persons in democratic societies.

### **III. The Right of Access to Public Records of All States is Important to the Maintenance or Well-Being of the Union.**

In its opinion, the Fourth Circuit held, "Access to a state's records simply does not bear upon the vitality of the Nation as a single entity." *McBurney v. Young*, 667 F.3d 454, 466 (4th Cir. 2012) (internal

quotations omitted). Such a declaration is simply incorrect. As the Third Circuit noted:

No state is an island – at least in the figurative sense – and some events which take place in an individual state may be relevant to and have an impact upon the policies of not only the national government but also of the states. Accordingly, political advocacy regarding matters of national interest or interests common between the states play an important role in furthering a vital national economy and vindicating individual rights.

*Lee v. Minner*, 458 F.3d 194, 199-200 (3d Cir. 2006). In other words, although each state is sovereign, the actions and policies of an individual state likely have an effect on other states and the Nation as a whole.

This interconnectedness is evident in the recent attempt by the federal government to address the recent housing meltdown. In February 2012, federal and state officials entered into a \$26 billion foreclosure settlement with five of the largest home lenders. Chris Isidore & Jennifer Liberto, *Mortgage deal could bring billions in relief*, CNN Money (Feb. 15, 2012), available at <http://money.cnn.com>. The agreement settled the potential charges brought by individual states concerning allegations against numerous companies of improper foreclosures. *Id.* The settlement, which was signed by the U.S. Department of Justice, the U.S. Department of Housing and Urban Development, and 49 state attorneys general, created a federal monitoring system to

oversee the foreclosure process and to assist distressed homeowners in receiving assistance related to prior foreclosures of their homes. *Id.* In other words, the federal government was instrumental in orchestrating a settlement between the individual states and the mortgage lenders.

Yet, the extent of the federal government's involvement in the day-to-day negotiations was unclear to the public. During a March 16, 2011 hearing of the House Financial Services Subcommittee on Financial Institutions and Consumer Credit, Elizabeth Warren, the interim head of the Consumer Financial Protection Bureau ("CFPB"), characterized the CFPB's involvement in the state settlement negotiations as: "We have been asked for advice by the Department of Justice, by the Secretary of the Treasury, and by other federal agencies. And when asked for advice, we have given our advice." Press Release, *Chairman Bachus Comments on Elizabeth Warren's Role in Mortgage Settlement Talks*, The Committee on Financial Services (Apr. 4, 2011). Because Ms. Warren did not indicate with any specificity the CFPB's role in the settlement negotiations, *Amicus* Judicial Watch sought public records from the CFPB under the federal Freedom of Information Act. For whatever reason, the federal agency did not provide all relevant and response records to Judicial Watch. Therefore, Judicial Watch extended its investigation and sought access to public records of all 50 state attorneys general.

In response to its requests for access to public records of all state attorneys general, *Amicus* Judicial Watch received records such as electronic mail, meeting minutes, and memoranda from more than

half of the attorneys general. These public records demonstrated, among other things, that Ms. Warren initiated and led emergency meetings with state attorneys general that her office insisted remain a secret. See *Letter to the Honorable Timothy Geithner*, U.S. House of Representatives Committee on Financial Services, dated June 20, 2011, available at <http://financialservices.house.gov>. In addition, the public records suggest that the CFPB's participation in the settlement negotiations was far more intense and aggressive than Ms. Warren described to Congress. Therefore, the ability to inspect public records of numerous states provided the public with a more full understanding of how the federal government was involved in the settlement agreement between state attorneys general and the mortgage lenders. In other words, the public records of the state attorneys general inspected by *Amicus* Judicial Watch directly relate to the "vitality of the Nation as a single entity." *Baldwin*, 436 U.S. at 383.

Similarly, *Amicus* Judicial Watch investigated the circumstances underlying the U.S. Department of Justice's announcement that the Department of Justice had entered into a consent decree with the City of Dayton concerning the allegation that the city had engaged in discrimination against African-Americans in its hiring of entry-level police officers and firefighters in violation of Title VII of the Civil Rights Act of 1964. Judicial Watch originally sought access to public records directly from the Department of Justice. Because the federal agency failed to respond to Judicial Watch's Freedom of Information Act request, Judicial Watch requested access to public records under the Ohio Public Records Act.

In response to *Amicus* Judicial Watch's request for communications between the Department of Justice and the Dayton Fire Department, the local entity provided records detailing the Department of Justice's objections to the entrance examinations used by the City of Dayton. Specifically, Judicial Watch discovered that the Department of Justice disapproved of the use of written tests for firefighter applicants because, in its opinion, it is very unlikely that an entry-level firefighter would have to do much writing. Judicial Watch subsequently disseminated this information to the public. Through access to the public records of the City of Dayton, Judicial Watch was able to shed light on how the U.S. Department of Justice used its enforcement authority under the Civil Rights Act of 1964 to prevent the Dayton Fire Department from testing whether firefighter applicants had the ability to write. In other words, the public records of the City of Dayton directly related to the activities of the federal government and the "Nation as a single entity." *Baldwin*, 436 U.S. at 383.

Besides shedding light on the federal government's interactions with state governments, the right of access to public records of all states also allows for the inspection of unpopular information that may not otherwise be inspected. A citizen of a state may be reluctant to request access to particular records due to the sensitivity or nature of the public records. In such instances, an individual or organization outside the state may be the only entity willing to request an unpopular inspection. *Piper*, 470 U.S. at 281. Most importantly, such a situation is not merely hypothetical. *Amicus* Judicial Watch



frequently requests access to a state's public records that citizens of that state may be reluctant to request because of undesired consequences. Through the right of access to public records, Judicial Watch has revealed corrupt practices of police departments, abuses of authority by regulating bodies, and waste of taxpayer funds on illegal expenditures.

For example, Judicial Watch is currently in litigation with the Colorado Attorney Regulation Counsel over records created and maintained by one of the administrative offices of the Colorado Supreme Court. As one court described Judicial Watch's efforts:

Judicial Watch questions the use of one state's resources (here, in the person of [the Attorney regulation Counsel] and his staff), to assist another state in a politically-charged ethics probe. Further, in this time of state budget shortfalls, the people of this State no doubt would be interested in how it came to be that a state employee was ordered to work for another jurisdiction and whether Colorado was adequately reimbursed for that work.

*Gleason v. Judicial Watch, Inc.*, Case No. 10CV0952, City and Country of Denver District Court (Bruce, J., Apr. 22, 2011). It is self-evident that the challenge to the authority and decision-making of the Colorado Supreme Court is unpopular and controversial. It is also likely that attorneys within the state would be hesitant to challenge their regulators. Therefore, without individuals or organizations like *Amici*

questions concerning the use of one state's resources may remain unanswered. In such scenarios, the right of noncitizens to access public records is no different than the noncitizen-attorney's ability to try unpopular cases within a state. The goals in both instances clearly are "important to the maintenance or well-being of the Union." *Piper*, 470 U.S. at 281.

### CONCLUSION

The right of access to public records pre-exists the formation of the Nation. In fact, the right of access to public records predates the development of the states. Individuals have always sought public records from city, county, and state governments to ensure that the people's representatives are properly and positively maintaining democracies and adhering to good government principles. If not overturned, the Fourth Circuit's ruling will hinder, if not abolish, the people's ability to monitor the workings of all governments. Because many policy decisions and activities of local governments are being debated or implemented in other localities across the Nation or effect the United States as a whole, the right of access to a public record not only sheds light on local government, but it also bears upon the vitality of the Nation as a single entity. For the foregoing reasons, *Amici* respectfully request that the petition for a writ of certiorari be granted.

Respectfully submitted,

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August 29, 2012

# **PETITIONER'S BRIEF**

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IN THE  
**Supreme Court of the United States**

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MARK J. MCBURNEY and ROGER W. HURLBERT,  
*Petitioners,*

v.

NATHANIEL YOUNG, JR., Deputy Commissioner and  
Director, Division of Child Support Enforcement,  
Commonwealth of Virginia and THOMAS C. LITTLE,  
Director, Real Estate Assessment Division, Henrico  
County, Commonwealth of Virginia,  
*Respondents.*

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On Writ of Certiorari to the United States  
Court of Appeals for the Fourth Circuit

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**BRIEF FOR PETITIONERS**

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DECEMBER 2012



## **QUESTION PRESENTED**

Under the Privileges and Immunities Clause and the dormant Commerce Clause of the United States Constitution, may Virginia deny the petitioners the right of access to public records that it affords its own citizens, solely because the petitioners are citizens of other states?



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## **OPINIONS BELOW**

The Fourth Circuit's opinion is reported at 667 F.3d 454 and reproduced at Pet. App. 1a. The district court's decision is reported at 780 F. Supp. 2d 439 and reproduced at Pet. App. 29a.

## **JURISDICTION**

The court of appeals entered its judgment on February 1, 2012. On April 25, 2012, Chief Justice Roberts extended the time to file a petition for a writ of certiorari to June 29, 2012. The petition was filed on that date and granted on October 5, 2012. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

Article I, Section 8 of the United States Constitution provides:

The Congress shall have Power . . . To regulate Commerce . . . among the several States . . . .

Article IV, Section 2 of the United States Constitution provides:

The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

The Virginia Freedom of Information Act limits the right to inspect and copy public records to "citizens of the Commonwealth," Va. Code § 2.2-3704(A), and permits the state to recoup its expenses in processing requests through "reasonable charges not to exceed its actual cost." *Id.* § 2.2-3704(F). These provisions are reproduced in full in an appendix to this brief.

## STATEMENT

Public records are, and always have been, a critical part of the Nation's commerce. In the information age, they form the raw material for a robust national market. "Once scattered about the country, now public records are consolidated by private sector entities into gigantic databases." Solove, *Access and Aggregation: Public Records, Privacy, and the Constitution*, 86 Minn. L. Rev. 1137, 1139 (2002). From dusty ledgers in rural courthouses to centralized computer servers, public records from all 50 states are gathered, sold, aggregated, mined, and resold for countless purposes. They are used to transfer property, collect debts, evaluate insurance and credit risks, screen job applicants, sell products, report the news, conduct scholarly research, scrutinize government, and investigate criminal activity. It is no exaggeration to say that the free flow of this information across state lines helps constitute our Nation as one.

In this case, the state of Virginia maintains that it may make its public records available to any Virginian who asks, but withhold those records from the petitioners—solely because they are citizens of other states. Petitioner Hurlbert is a Californian who earns his living gathering real property records nationwide on behalf of his clients. Petitioner McBurney is a Rhode Islander who seeks records relating to a proceeding in which a state agency's actions directly affected his financial interests. This case thus concerns two of the oldest and most basic types of public records—real property records and records relating to public proceedings.

### A. Real Property Records

The link between public records and property rights was cemented "in the early days of seventeenth-century settlement" through "one of the first and most important American [legal] innovations"—"a system for registering

and recording titles to land.” Friedman, *A History of American Law* 27 (3d ed. 2005). “The essence of the system was that *the record itself* guaranteed title to the land.” *Id.* (emphasis added). Under this system, “any person may place upon the public records” certain legal instruments and “thereby put the world on notice of his claim to the land.” Payne, *In Search of Title*, 14 Ala. L. Rev. 11, 33 (1961). The result is that, in the United States, “virtually all such instruments are registered and the public records tend to reflect a complete history of the transactions affecting the title to land.” *Id.* The system, largely unknown in England at the time of the Founding, was born out of necessity—whereas “[i]n old, traditional communities, everybody *knew* who owned the land,” in colonial America, “where land was a commodity,” recording was “an important tool of the volatile, broadly based land market.” Friedman, *American Law*, at 27.

1. The American recording system’s origins can be traced to the Jamestown settlement and the Virginia Colony. Beale, *The Origin of the System of Recording Deeds in America* 2 (1907). The first surviving legislation is a vote from 1626 that all land sales should be brought to Jamestown and enrolled in the General Court within a year. 1 Bruce, *Economic History of Virginia in the Seventeenth Century* 570 (1895). This proved ineffective, however, and in 1640, an act was passed providing that a deed or mortgage of land would be “adjudged fraudulent unless entered in some court.” 1 *Hening’s Statutes at Large* 227 (1640). From 1624 to the present, the task has been performed by Virginia county clerks. *Historical Records Survey, Inventory of County Archives of Virginia* 16 (1939); Porter, *County Government in Virginia: 1607-1904*, at 9 (1966).

Another critical feature of the American system—priority to the first recorded deed—was established in Massachusetts. See Haskins, *The Beginnings of the Recording System in Massachusetts*, 21 B.U. L. Rev. 281 (1941). In 1636, the Plymouth Bay Colony enacted a law “that all sales exchanges giftes mortgages leases and other Conveyances of howses and lands” must be “committed to the publick Record.” 11 *Records of the Colony of New Plymouth* 12 (1855). Four years later, in 1640, Massachusetts enacted a general ordinance—providing that no land transaction would have any force “unless the same bee recorded”—that remains the same in substance today. 1 *Records of the Governor and Company of the Massachusetts Bay* 306-07 (1853). Its express purpose was not only “avoyding fraudulent conveyances,” but also public disclosure—that “every man may know what estate or interest other men may have in any houses, lands or other hereditaments they are to deale in.” *Id.*

Local officials’ obligation to record and disclose this information was taken seriously. By 1644, town meeting clerks in Connecticut had to take the following oath: “Swear by the dredfull name of the ever living God that you will keep an entry of all grants, deeds of sale or mortgages of lands, and all marriages, births, deaths and other writings brought to you and deliver copies when required of you.” Daniels, *Political Structure of Local Government in Colonial Connecticut* 65 (1978).

Founding Era courts made clear that property records were public records, open to all. See *Evans v. Jones*, 1 Yeates 172, 173 (Pa. 1792) (“[A]ny one by having recourse to the offices of the recorders, may ascertain the previous liens upon the property, which he wishes to purchase. The records are constructive notice to all mankind.”); *Jackson v. McGavock*, 26 Va. 509, 538 (1827)



("The implied or presumptive notice afforded by an entry, and which *every one has a right to inspect*, must be considered sufficient notice to all interested, of the facts stated in that entry.") (emphasis added).

2. The American recording system gave rise to new industries, including title abstracting and title insurance. By the twentieth century, the "rise of commercial abstracting" had created "a business of 'enormous proportions.'" Payne, *In Search of Title*, at 37. Those in the industry "engage[d] in the business of searching for public records, making abstracts of title to real estate for the public for compensation." Niblack, *Abstracters of Title: Their Rights and Duties with Special Reference to the Inspection of Public Records* 1 (1908). Abstracts—summaries of "all of the instruments contained in the public records affecting the title to a particular piece of land"—eliminated the "labor of repeated reexamination of the same original records." Payne, *In Search of Title*, at 35.

At first, some local officials and courts were hostile to commercial abstracters' efforts to gather public records on a wide scale, resulting in hard-fought litigation and "bad feeling between officers and abstract men." Niblack, *Abstracters*, at 111-12. Resistance came from local "custodians of records who had a vested interest in fees for copies" and feared that the availability of private databases would cut into their revenue. Cross, *The People's Right to Know: Legal Access to Public Records and Proceedings* 28 (1953). Even as they conceded that "[a]ll persons have the right to inspect these records freely," some courts openly worried that allowing access to the abstracters would "aid them in their business" while "depriv[ing] the register of the emoluments of his office." *Newton v. Fisher*, 3 S.E. 822, 823-24 (N.C. 1887). Other

courts expressed scorn for anyone interested in public records for "simply private gain," *Webber v. Townley*, 5 N.W. 971, 973 (Mich. 1880), or their "own profit." *Buck & Spencer v. Collins*, 51 Ga. 391, 396-97 (1874).

Over time, however, commercial data-gatherers overcame provincial resistance, as courts and legislatures came to recognize that there was "no good reason" to withhold the right to inspect and copy public records from "any person,' even [] abstracters of titles." *Boylan v. Warren*, 18 P. 174, 177 (Kan. 1888); *Burton v. Tuile*, 44 N.W. 282 (Mich. 1889) (overruling *Webber v. Townley*). Today, data gathers routinely obtain real property records—including deeds, mortgages, land surveys, and tax assessment records—from state and local governments nationwide.

## **B. Records Relating to Public Proceedings**

A second category of public records, those relating to public proceedings, has a longer pedigree in Anglo-American law. In England, the right to access the records of public proceedings dates to at least 1372, during the reign of King Edward III, when Parliament enacted a statute giving all subjects the right to inspect court records—a response to the King's attempts to deny his adversaries documents that could be harmful to him. 46 Edw. 3 (1372); 2 Eng. Stat. at Large 191, 196-97 (1341-1411).

In America, the right was guaranteed—both as to judicial and non-judicial records—by the first colonial bill of rights, the Massachusetts Body of Liberties of 1641, which declared that "Every inhabitant of the Country shall have free liberty to search and review any rolls, records or registers of any Court or office." art. 48. Coming just one year after the colony's recording statute (*see*

*supra* at 4), this right encompassed both court records and property records.

At the Founding, "every subject" had the common-law right to inspect "[s]uch documents of public proceedings as are lodged in the custody of public officers for the public use." *Rex v. The Fraternity of Hostmen in Newcastle-Upon-Tyne*, 93 Eng. Rep. 144 (K.B. 1744). These records included "books of the sessions," which "every body [had] a right to see." *Herbert v. Ashburner*, 95 Eng. Rep. 628, 628 (K.B. 1750). Books open to the public also included records of the Court of the King's Bench. As Lord Coke explained, these records were kept "in the King's Treasury. And yet not so kept but that *any subject* may for his necessary use and benefit have access thereunto, which was the ancient law of England, and so is declared by an act of Parliament." 2 *The Reports of Sir Edward Coke*, preface (1572-1617) (emphasis added).

In England, the common-law right to inspect public records also extended beyond judicial records, to other records in which a person had a "proprietary interest in the document." *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978) (recounting history). Tenants of a manor or members of a corporation had "clearly settled" right to inspect these entities' records by virtue of their membership in them. See *Rex v. Shelley*, 3 T.R. 141, 142 (1789); *Rex v. Babb*, 3 T.R. 579, 580 (K.B. 1790) (holding that citizens could inspect the books and papers of a borough to determine the limits of a mayor's authority).

English cases also recognized the right of strangers to inspect records in circumstances that implicated their property interests or livelihood. Thus, "every man" had a right to inspect records from a "proceedings to which he [had been] a party." *Wilson v. Rogers*, 2 Str. 1242 (K.B.

1745). And those engaged in a trade had a right to access records of entities with regulatory control over that trade. In one case, for example, a brewer was granted the right to inspect and make copies of the company's books, even though he was not a member of the company, because "[b]y-laws affecting strangers interest them therein." *The Brewers Co. v. Benson Barnes* 236 (K.B. 1745); see also *Harrison v. Williams*, 3 B. & C. 162 (K.B. 1824) (granting a tanner the right to inspect bylaws that restricted practicing his trade within city limits).

This common-law right of access to public proceedings was embraced by the Founders and American courts as essential to the protection of individual rights. As James Madison wrote: "A popular Government without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy: or perhaps both. ... A people who mean to be their own Governors, must arm themselves with the power which knowledge gives." Letter from James Madison to W. T. Barry, August 4, 1822, in 9 *The Writings of James Madison* 103 (Hunt ed. 1910). A century ago, Virginia's highest court declared that "upon general principles, independently of any statute on the subject, any person having an interest" in public records "would have a right to inspect them." *Clay v. Ballard*, 13 S.E. 262, 263 (1891); see also *Nixon*, 435 U.S. at 597 ("It is clear that the courts of this country recognize a general right to inspect and copy public records and documents.").

### C. Virginia's Citizens-Only Restriction

Virginia limits the right to inspect and copy its public records to its own citizens. The Virginia Freedom of Information Act provides that "all public records shall be open to inspection and copying by any citizens of the Commonwealth" and authorizes public record custodians



to “require the requester to provide his name and legal address” to verify the requester’s Virginia citizenship. Va. Code § 2.2-3704(A).

Some, but not all, media organizations are exempted from this citizens-only restriction, which extends the right of access to “newspapers and magazines with circulation in the Commonwealth” and “radio and television stations broadcasting in or into the Commonwealth,” regardless of their owners’ citizenship. *Id.* All other out-of-state media—including newspapers without Virginia circulation, online publications, and independent journalists—are denied the right to access public records.

The statute allows any Virginia public body to recoup the “actual cost incurred in accessing, duplicating, supplying, or searching for the requested records” by assessing “reasonable charges.” *Id.* § 2.2-3704(F). The only constraint is that the public body may not derive a profit from these fees. *Id.* To this end, the statute prohibits “extraneous, intermediary or surplus fees” and “duplication fee[s]” that “exceed the actual cost of duplication.” *Id.* Agencies may also provide virtually cost-free access to records by “posting the records on a website or delivering the records through an electronic mail address provided by the requester.” Va. Code § 2.2-3704(G).

The citizens-only restriction is selectively enforced. See Desai, *The End of Non-Citizen Exclusions in State Freedom of Information Laws?*, 58 Admin L. Rev. 235, 244 n.62 (2006). Not all Virginia agencies routinely deny out-of-state records requests. Some have “never denied” a request “based on citizenship.” *Report of the Virginia Freedom of Information Act Advisory Council to the Governor and General Assembly of Virginia* (2010)



(“VFOIA Report”) at 6.<sup>1</sup> The Virginia State Bar “usually” honors out-of-state records requests—most of which come from commercial “data aggregators”—and the Department of Motor Vehicles “usually” does so as well, reporting that “it is not a big problem for them.” *Id.* at 5-6.

Virginia’s inconsistent enforcement of its citizens-only restriction stems, in part, from its recognition that “in practice, [the restriction] is easily overcome—requesters turned down for being out of state can generally find someone in Virginia to make the request for them.” Desai, *Non-Citizen Exclusions*, 58 Admin. L. Rev. at 244 n.62 (quoting Lisa Wallmeyer, former Assistant Director of the Virginia Freedom of Information Advisory Council). Indeed, the state agency charged with interpreting the Act acknowledges “the likelihood of an out-of-state corporation getting a Virginia citizen to make the request for it.” Advisory Opinion to John Baulis (Aug. 6, 2001).<sup>2</sup> Thus, although the citizens-only restriction can be sidestepped with “ease,” *VFOIA Report* at 5, it often imposes an additional cost on non-Virginians, requiring them to hire an in-state proxy to obtain public records on their behalf.

Although several other states had citizens-only restrictions like Virginia’s, Arkansas and Tennessee are the only two states that continue to enforce restrictions like Virginia’s.<sup>3</sup> Seven states have repealed or replaced

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<sup>1</sup>[http://leg2.state.va.us/dls/h&sdocs.nsf/By+Year/HD152010/\\$file/HD15.pdf](http://leg2.state.va.us/dls/h&sdocs.nsf/By+Year/HD152010/$file/HD15.pdf).

<sup>2</sup> [http://foiacouncil.dls.virginia.gov/ops/01/AO\\_37.htm](http://foiacouncil.dls.virginia.gov/ops/01/AO_37.htm).

<sup>3</sup> See Ark. Code § 25-19-105(a)(1)(A); Tenn. Code §10-7-503. A constitutional challenge to Tennessee’s restriction is fully briefed and pending before the Sixth Circuit. See *Jones v. City of Memphis*, No. 12-5558 (argument currently set for January 16, 2013).

their citizens-only restrictions.<sup>4</sup> Three other states' statutes give "every citizen" a right to inspect records, without specifying U.S. or state citizenship; of these states, at least two take the position that this language should not be read to limit access to citizens of the state.<sup>5</sup> Among states that permit everyone to access their public records, there has been "no clamoring for changing the law." *VFOIA Report* at 5.

As a result, Arkansas and Tennessee are the only other states to enforce citizens-only restrictions like Virginia's. Recently, two Arkansas state agencies agreed to

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<sup>4</sup> California, Delaware, Florida, Georgia, New Jersey, New Mexico, and Pennsylvania have all repealed their citizens-only restrictions. See Cal. Gov. Code § 6253; 2012 Del. Laws Ch. 382 (S.B. 231); 1975 Fla. Laws c. 75-225, § 2 (eff. July 1, 1975); 2012 Ga. Laws, Act 605, § 2 (H.B. 397) (eff. April 17, 2012); N.J. P.L. 2001, c. 404 § 17; N.M. Stat. § 14-2-1 (eff. July 1, 2011); Pa. Cons. Stat. § 67.701 (eff. Jan. 1, 2009). Before it was repealed, Delaware's restriction was held unconstitutional under the Privileges and Immunities Clause in *Lee v. Minner*, 458 F.3d 194, 199 (3d Cir. 2006). Missouri's 1961 Public Records Law limited the right to inspect public records to "citizens of Missouri," Mo. Rev. Stat. § 109.180, but was effectively replaced by its 1973 Sunshine Law, requiring that public records be "open to the public," with no citizenship restriction, Mo. Rev. Stat. §§ 610.010-.030.

<sup>5</sup> Alabama, Montana, and New Hampshire give "every citizen" a right to inspect records, without specifying federal or state citizenship. See Ala. Code § 36-12-40; Mont. Code § 2-6-102. The attorneys general of New Hampshire and Alabama take the position that this language should not be used to restrict access to state citizens, and Georgia's attorney general took a similar position before repeal of its restriction. See Memorandum on New Hampshire's Right-to-Know Law, at 36 n.23 (July 15, 2009), available at <http://www.doj.nh.gov/civil/documents/right-to-know.pdf>; Ala. Op. Att'y Gen. No. 2001-107 (Mar. 1, 2001); Ga. Op. Att'y Gen. No. 93-27 (Dec. 15, 1993).

honor all future out-of-state public records requests in response to a constitutional challenge to the restriction.<sup>6</sup> Arkansas' attorney general continues to maintain that its citizens-only restriction is constitutional, Ark. Op. Att'y Gen. No. 2012-017 (Feb. 10, 2012), but has opined that a plan by an Arkansas county to discriminate between residents and non-residents with respect to public website access would be unconstitutional. Ark. Op. Att'y Gen. No. 2011-060 (Aug. 1, 2011). In Tennessee, where the Attorney General has likewise defended the constitutionality of the citizens-only restriction, Tenn. Op. Atty. Gen. No. 99-067 (Mar. 18, 1999), the legislature commissioned a special committee on its public records laws, which recommended eliminating the restriction. *See* 2008 Tennessee Laws Pub. Ch. 1179 (S.B. 3280); *Report of the Joint Study Committee on Open Government* § 7(a)(1) (2007).<sup>7</sup>

#### D. Factual Background

1. Roger Hurlbert is a Californian who earns his living by obtaining property records from state and local governments on behalf of his clients. CA4 J.A. 46A-47A. He most often obtains copies of computer-readable data showing property ownership, valuations, land tenure, and land use. *Id.* at 47A. Hurlbert's clients pay him to obtain these documents, usually held by county clerks, by making requests under state open-records statutes and negotiating with officials for their release. *Id.* at 47A,

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<sup>6</sup> *See Belth v. Daniels*, No. 4-11-cv-009-JMM (E.D. Ark. May 16, 2011), Doc. No. 16-1, <https://ecf.ared.uscourts.gov/doc1/02712330164> (settlement agreement).

<sup>7</sup> <http://web.knoxnews.com/pdf/1219open-report.pdf>. A constitutional challenge to Tennessee's restriction is fully briefed and pending before the Sixth Circuit. *See Jones v. City of Memphis*, No. 12-5558 (argument currently set for January 16, 2013).

70A. Although he operates his business from California, his clients seek public documents from all over the country. *Id.* at 46A-47A.

In 2008, a client hired Hurlbert to obtain property records from the Tax Assessor of Henrico County, Virginia. *Id.* at 47A. An official from the office denied Hurlbert's request because he was not a Virginia citizen. *Id.* Hurlbert was thus forced to stop offering his retrieval services with respect to all public records in Virginia. *Id.* at 47A-48A, 66A, 70A.

2. Mark McBurney is a Rhode Islander who lived in Virginia from 1987 to 2000. *Id.* at 33A. In 2008, he requested public records from the Virginia Division of Child Support Enforcement to get to the bottom of the agency's repeated mishandling of its responsibility to enforce child support obligations owed by his former wife, a Virginian, while McBurney was living overseas. *Id.* at 35A-38A. The agency at least twice—and McBurney suspects as many as four times—filed his petitions for child support in courts that lacked jurisdiction. *Id.* 36A-37A. McBurney was unable to participate in hearings on these petitions because the agency failed to notify him of the hearing dates. *Id.* As a result, he does not know what happened at those hearings. *Id.* Ultimately, the agency's mistakes deprived McBurney of almost nine months of child support payments. *Id.* at 37A.

The agency denied McBurney's first request—seeking records in his case file, including documents pertaining to him, his son, his former wife, and his child-support application—in a letter stating: "You are not entitled to the information as you are not a Citizen of [the] Commonwealth of Virginia." *Id.* at 36a-39A. He then sent a second request, this time from a Virginia address, seeking the same records as well as any regulations, administrative guidelines, or policies relied upon by the



agency in cases where one parent is overseas. *Id.* The agency again denied the request, this time writing: "Our records indicate that you are not a citizen of the Commonwealth of Virginia" and, "[t]herefore, you are not eligible to obtain information under the Virginia Freedom of Information Act." *Id.* at 36A, 45A. Although McBurney ultimately received some documents about his case under a different statute, he has never received the general policy information he sought about how the agency handles cases like his. Pet. App. 54a. Nor has he ever received a list of withheld documents or an explanation of why they were withheld, other than the fact that he lives in Rhode Island. *Id.* at 39a.

#### **E. Proceedings Below**

1. Petitioners sued the Deputy Commissioner and Director of the Virginia Division of Child Support Enforcement, and the Director of the Henrico County Real Estate Assessor's Office, seeking declaratory and injunctive relief. They alleged that Virginia's citizens-only restriction violates the dormant Commerce Clause and the Privileges and Immunities Clause. First Am. Compl. ¶ 1. Hurlbert alleged that the restriction discriminates against interstate commerce and denies him the right to pursue a common calling by barring him from pursuing his national public records retrieval business in the Virginia market on an equal basis with Virginians. *Id.* ¶¶ 36, 41. McBurney alleged that the citizens-only restriction precluded him from, among other things, enjoying equal access to the procedures used to resolve his child-support case. *Id.* ¶¶ 34-35. Respondents moved to dismiss the suit for lack of standing, and the district court granted their motions as to both petitioners. *McBurney v. Mims*, 2009 WL 1209037 (E.D. Va. 2009).

2. The Fourth Circuit reversed, holding that both petitioners had standing. Pet. App. 64a-68a. In a concur-



rence, Judge Gregory discussed the merits, writing that Hurlbert, by alleging that Virginia had denied him information he uses in his business for profit, had made out “a classic common-calling claim under the Privileges and Immunities Clause.” *Id.* at 72a.

3. On remand, the parties filed cross-motions for summary judgment. Virginia argued that the statute does not run afoul of the dormant Commerce Clause because it “does not regulate commercial activity.” *Id.* at 48a. It further argued that access to public information is not a privilege that the Privileges and Immunities Clause requires the state to extend on an equal basis. *Id.* at 39a. Alternatively, Virginia contended that the citizens-only restriction was justified by a substantial state interest because responding to non-Virginians’ requests would consume resources otherwise available to Virginians. *Id.* Virginia presented no evidence of the burden posed by non-citizen requests.

The district court granted the defendants’ motion. It rejected their argument that Hurlbert was not engaged in a common calling because it was “undisputed that his clients pay him to request records from state governments,” but concluded that any effect the statute had on his ability to perform that work in Virginia was “merely incidental.” *Id.* at 38a. The court thus held that the citizens-only restriction violates neither the Privileges and Immunities Clause nor the dormant Commerce Clause, without addressing whether Virginia had any legitimate purpose for discriminating against non-citizens.

4. The Fourth Circuit affirmed. The Fourth Circuit rejected Hurlbert’s dormant Commerce Clause claim on the ground that the statute does not expressly mention businesses, reasoning that the citizens-only restriction does not discriminate against interstate commerce because it is “wholly silent as to commerce or economic in-

terests” and, “[a]t most ... prevents Hurlbert from using his chosen way of doing business,” not “from engaging in business in the Commonwealth.” *Id.* at 26a-27a (internal quotation marks omitted).

The court also rejected both Hurlbert’s and McBurney’s claims under the Privileges and Immunities Clause. As to McBurney, the court held that the Privileges and Immunities Clause did not encompass his right to access public records arising out of his own child-support proceeding. *Id.* at 22a. As to Hurlbert, the court reasoned that the statute on its face “addresses no business, profession, or trade” and therefore has only an “incidental effect on his common calling in Virginia.” *Id.* at 17a-18a.

## SUMMARY OF ARGUMENT

I. Virginia’s citizens-only policy flouts the Constitution’s core principle of nondiscrimination among states, embodied in the Privileges and Immunities, Full Faith and Credit, and Commerce Clauses. Through all three, the Framers sought to end the favoritism that had plagued the Articles of Confederation and instead “fuse into one Nation a collection of independent, sovereign States.” *Toomer v. Witsell*, 334 U.S. 385, 395 (1948).

II. Virginia’s citizens-only restriction discriminates against out-of-state economic interests both facially and in effect, and is therefore “virtually per se invalid” under the Commerce Clause. *Or. Waste Sys. v. Dep’t of Env’tl. Quality*, 511 U.S. 93, 99 (1994).

1. Virginia does not deny that its statute discriminates against non-Virginians on its face. Instead, Virginia argued below that the citizens-only restriction does not discriminate against *commerce* because it regulates only access to public records. That argument overlooks this Court’s unanimous decision in *Reno v. Condon*, 528

U.S. 141, 148-49 (2000)—which held that public records released into commerce are “article[s] of commerce”—as well as the contemporary reality of the robust national market for public information.

2. Virginia’s citizens-only restriction also discriminates against interstate commerce in effect, denying businesses in every other state the right to access public records that identical in-state businesses may demand. The inevitable result is to divert work to Virginians that might be carried out more efficiently by non-Virginians. Allowing restrictions like that to flourish would stifle competition, cause prices to rise, and lead to economic Balkanization—the very effects the Framers sought to avoid.

3. The court of appeals erred by focusing on whether the statute has the purpose of discriminating against commerce or expressly targets commerce. Neither has any bearing on the proper discrimination analysis as articulated by this Court. And the effects on commerce here are not merely “incidental,” as the court below believed; they are direct and anticompetitive because the statute bars non-Virginia businesses from obtaining records that are freely available to Virginia businesses.

III. The Privileges and Immunities Clause “outlaw[s] classifications based on the fact of non-citizenship” absent an indication that non-citizens are “a peculiar source of evil.” *Toomer*, 334 U.S. at 395. By denying non-Virginians access to public information, based solely “on the fact of non-citizenship,” *id.*, Virginia violates that command in several ways.

1. Because it categorically bars non-Virginians from providing records-retrieval services in Virginia, the citizens-only restriction violates petitioner Hurlbert’s right

to a common calling—a right “the clause plainly and unmistakably secures.” *Ward v. Maryland*, 79 U.S. (12 Wall.) 418, 430 (1870).

2. By refusing to give non-Virginians equal access to public real estate records that are indispensable to securing property rights, Virginia has failed to place non-Virginians on the “same footing” with respect to “the acquisition and enjoyment of property,” *Paul v. Virginia*, 75 U.S. 168, 180 (1869), perhaps the most fundamental of rights protected by the Clause.

3. By denying petitioner McBurney’s request for public records relating to his own case before a state agency—including general policies used to handle his case—Virginia violates the fundamental rule that public proceedings “must remain open” to citizens and non-citizens “on the same basis,” *Miles v. Illinois Cent. R. Co.*, 315 U.S. 698, 704 (1942), and does so in a way that burdens his right to enforce debts on equal terms.

4. No state may wall itself off from the free flow of information. Because “[e]quality in access” to information itself is “basic to the maintenance or well-being of the Union,” *Baldwin v. Fish & Game Comm.*, 436 U.S. 371, 388 (1978), once Virginia chooses to make information public, it must make that information available on equal terms to citizens and non-citizens alike. As the Full Faith and Credit Clause shows, the Framers believed that the movement of public records across state lines was “fundamental to the promotion of interstate harmony.” *Id.*

IV. Virginia’s only justification for its statute—that allowing non-Virginians access to information would reduce resources available for Virginians—fails both Commerce and Privileges and Immunities Clause scrutiny.



1. Virginia's justification is itself discriminatory. The citizens-only restriction turns not on the *burden* posed by the request, but on the *citizenship* of the requester—an unconstitutional distinction. And the notion that public records are a resource to be conserved makes no sense because records—unlike fisheries or oil reserves—face no risk of depletion from those seeking *copies*.

2. Virginia has not demonstrated that allowing non-Virginians access imposes *any* additional cost. Virginia law authorizes the state to fully recoup its actual cost incurred through fees. There is “no reason to believe” that these fees “will not be adequate to pay for any additional administrative burden.” *Barnard v. Thorstenn*, 489 U.S. 546, 556 (1989).

3. Finally, even if Virginia could show some connection between the citizenship of a requester and the burden of a request, it would not justify the “drastic” remedy of “total exclusion.” *Toomer*, 334 U.S. at 398.

## ARGUMENT

### I. Virginia's Citizens-Only Restriction Is At Odds With the Constitution's Core Principle of Nondiscrimination Among the States.

Virginia asserts the power to deny to any citizen of another state the right to access the public records that it makes freely available to its own citizens. That state policy is at odds with a core principle of nondiscrimination—one that disfavors “distinctions, preferences, and exclusions” based on state citizenship, particularly in matters affecting commerce and economic interests—embodied in both the Privileges and Immunities Clause and the Commerce Clause. *The Federalist* No. 7, at 35-36 (Hamilton) (Lodge ed., 1888). Together with the Full Faith and Credit Clause, these clauses aim to achieve



“horizontal federalism” by avoiding friction and helping “fuse into one Nation a collection of independent, sovereign States.” *Toomer v. Witsell*, 334 U.S. 385, 395 (1948); see Erbsen, *Horizontal Federalism*, 93 Minn. L. Rev. 493 (2008).

This Court has long recognized the “mutually reinforcing relationship” between the Commerce Clause and the Privileges and Immunities Clause, which “stems from their common origin in the Fourth Article of the Articles of Confederation and their shared vision of federalism.” *Hicklin v. Orbeck*, 437 U.S. 518, 531-32 (1978) (footnote omitted). That common origin—a promise that “the free inhabitants of each [State] ... shall be entitled to all *privileges and immunities* of free citizens in the several States,” including “all the privileges of *trade and commerce*”—reflects the Framers’ intent that the two clauses “secure and perpetuate” the same end: “mutual friendship and intercourse among the people of the different states.” Articles of Confederation of 1781, art. IV, para. 1 (emphasis added). Alongside this language was a forerunner to our Full Faith and Credit Clause, which encouraged interstate comity by insisting that states honor “the records, acts and judicial proceedings of the courts and magistrates of every other State.” *Id.*, para. 3.

The promise of comity went unfulfilled under the Articles of Confederation. Because the federal government lacked any effective enforcement power, Article IV was routinely flouted by the states, many of which passed laws giving “preference to their own citizens,” 1 *Records of the Federal Convention of 1787*, at 317 (Farrand, ed., 1911) (Madison)—a practice “certainly adverse to the spirit of the Union,” Madison, “Vices of the Political System of the United States,” in 2 *The Writings of James Madison*, at 363. As Justice Story later recounted,

“[m]easures of a commercial nature” would be “adopted in one state from a sense of its own interests” and then “often countervailed or rejected by other states from similar motives.” 1 Story, *Commentaries on the Constitution of the United States* 185 (5th ed. 1891). And despite the guarantee of full faith and credit, citizens of one state could not even rely on the public records or judgments from another state to pursue debtors across state lines. See, e.g., *Phelps v. Holker*, 1 U.S. (1 Dall.) 261, 264 (Pa. 1788).

The “Constitution was adopted, among other things, to remedy those defects in the prior system.” *Ward v. Maryland*, 79 U.S. (12 Wall.) 418, 431 (1870). “[A]void[ing] the tendencies toward economic Balkanization that had plagued relations” among the States was “an immediate reason for calling the Constitutional Convention.” *Granholm v. Heald*, 544 U.S. 460, 472 (2005) (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 325-26 (1979)). Indeed, “[i]f there was any one object riding over every other in the adoption of the constitution, it was to keep the commercial intercourse among the States free from all invidious and partial restraints.” *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 231 (1824) (Johnson, J., concurring).

The Framers achieved this objective in several complementary ways. *First*, because the Privileges and Immunities Clause was critically important—so much so that Alexander Hamilton considered it “the basis of the Union,” *The Federalist No. 80*, at 497 (Hamilton)—the Framers transplanted the core of that Clause from the Articles of Confederation to the Constitution. U.S. Const. art. IV, §2, cl. 1; see also 3 *Records of the Federal Convention*, at 112 (Charles Pinckney, drafter of Privileges and Immunities Clause, stating that it was “formed

exactly upon the principles of the 4th article of the present Confederation"). And to ensure "the inviolable maintenance of that equality of privileges and immunities to which the citizens of the Union will be entitled," the Framers authorized the creation, in Article III, of an independent "national judiciary" with the power to hear cases between citizens of different states and thus enforce the Clause's protections. *The Federalist* No. 80, at 497 (Hamilton).

*Second*, the Framers adopted, immediately preceding the text of the Privileges and Immunities Clause, a broader Full Faith and Credit Clause to ensure that "the public Acts, Records, and judicial Proceedings" of each state would be honored in "every other state." U.S. Const. art. IV, § 1, cl. 1. As Justice Jackson observed, this language "include[s] nonjudicial 'public' acts and records, which the Articles had not mentioned," *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 Colum. L. Rev. 1 (1945), meaning "not only records of judicial proceedings but records of deeds, mortgages, marriages, and the like, kept in public offices," Burdick, *The Law of the American Constitution: Its Origin and Development* 476 (1922). The Clause ensured that "rights and property would belong to citizens of every state, in many other states than that in which they resided." 2 Story, *Commentaries*, at 190.

The Framers thus recognized that, if the league of states was to become a nation, citizens would need to engage in commerce, acquire property, collect debts, and enter into other acts of legal significance across state lines, and that respect for public records and judgments among the states would be essential to making that activity possible. The Privileges and Immunities Clause complements the Full Faith and Credit Clause in part be-

cause “[r]ecognition of another state’s ‘Acts, Records, and judicial Proceedings’ would be of little consequence if the state were free to favor their own citizens over those of other states,” 1 Stephens, *American Constitutional Law: Sources of Power and Restraint* 341 (5th ed. 2012), for example, by barring them from state court-houses, forbidding them from owning property, or—as in this case—barring them from the public archives. After all, one can hardly make use of another state’s public records if one cannot get them in the first place.

*Third*, the Framers created a stand-alone Commerce Clause giving the federal government the power to regulate interstate commerce and, by negative implication, limiting the states’ ability to do the same. U.S. Const. art. I, § 8, cl. 3; see 3 *Records of the Federal Convention*, at 478 (Madison) (“[The Commerce Clause] was intended as a negative and preventative provision against injustice among the States themselves.”).

Although located in different parts of the Constitution, the Commerce and Privileges and Immunities Clauses remained closely linked. Their separation was structural: whereas the Privileges and Immunities Clause *expressly* restricts state power (by limiting discrimination based on citizenship), the Commerce Clause *impliedly* does so (by limiting discrimination against interstate commerce). See *United Bldg. & Constr. Trades Council v. Mayor & Council of Camden*, 465 U.S. 208, 220 (1984). These mutually reinforcing provisions—one an “implied restraint,” the other a “direct restraint,” *id.*—give meaning to the fundamental constitutional principle of nondiscrimination on the basis of state citizenship. As we now explain, because Virginia’s citizens-only restriction on the right to access public records is



fundamentally at odds with that principle, it is invalid under both clauses.<sup>8</sup>

## II. The Citizens-Only Restriction Violates the Dormant Commerce Clause.

“Time and again,” this Court has reiterated that, “in all but the narrowest circumstances, state laws violate the Commerce Clause if they mandate ‘differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.’” *Granholm*, 544 U.S. at 472 (quoting *Or. Waste Sys., Inc. v. Dep’t of Env’tl. Quality of Or.*, 511 U.S. 93, 99 (1994)). A state law that “discriminates against interstate commerce,” whether on its face or in its practical effect, “is virtually *per se* invalid.” *Dep’t of Revenue of Ky. v. Davis*, 553 U.S. 328, 338 (2009) (internal quotation marks omitted). In such cases, this Court has “generally struck down the statute without further inquiry.” *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986).

Virginia’s citizens-only restriction on public records access is unconstitutional under these “well-settled principles.” *C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383, 386 (1994). It discriminates against out-of-state economic interests, both facially and in ef-

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<sup>8</sup> Although some members of the Court have expressed doubts about the negative Commerce Clause, none has questioned the Privileges and Immunities Clause’s nondiscrimination rule, *see, e.g., Hillside Dairy Inc. v. Lyons*, 539 U.S. 59, 68 (2003) (Thomas, J., dissenting); *Tyler Pipe Indus. v. Wash. State Dep’t of Revenue*, 483 U.S. 232, 265 (1987) (Scalia, J., dissenting) (arguing that “discrimination against citizens of other States” should be “regulated not by the Commerce Clause but by the Privileges and Immunities Clause”).



fect, and the state has advanced no justification for that discrimination—much less a justification that could meet a burden “so heavy that facial discrimination by itself may be a fatal defect.” See *Or. Waste*, 511 U.S. at 101 (internal quotation marks omitted).

1. **Facial Discrimination.** To determine whether a law violates the dormant Commerce Clause, this Court “first ask[s] whether it discriminates on its face against interstate commerce.” *United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007). “In this context, ‘discrimination simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.’” *Id.* (some internal quotation marks omitted; quoting *Or. Waste*, 511 U.S. at 99); see *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.*, 520 U.S. 564, 581 (1997) (state law affording more favorable tax treatment to camps that served mostly in-state residents “facially discriminates against interstate commerce”). Facially discriminatory state laws like Virginia’s are subject to “the strictest scrutiny.” *Hughes*, 441 U.S. at 337.

Virginia’s citizens-only restriction provides that “all public records shall be open to inspection and copying by any citizens of the Commonwealth” and that “[a]ccess to such records shall not be denied to citizens of the Commonwealth.” Va. Code § 2.2-3704(A). By expressly guaranteeing access to public records only to Virginians, while authorizing officials to withhold such access from citizens of other states, the statute facially discriminates against the economic interests of out-of-state businesses that, like Hurlbert’s, wish to participate in the Virginia records-retrieval market. Hurlbert was denied access to records solely because his letter listed “only an out-of-

state return address.” Dist. Ct. Doc. No. 7 at ¶ 4 (Answer). That “geographic distinction . . . patently discriminates against interstate commerce.” *Or. Waste*, 511 U.S. at 100.

In today’s economy, where data is collected and traded on the open market, public records are indisputably the stuff of commerce—just as much as milk, or wine, or garbage. See *Philadelphia v. New Jersey*, 437 U.S. 617, 622 (1978) (“All objects of interstate trade merit Commerce Clause protection.”) (emphasis added). As this Court held unanimously in *Reno v. Condon*, state public records—there, public records containing drivers’ information—are “article[s] of commerce” under the Commerce Clause because they are released, sold, compiled into databases, and resold for various commercial purposes. 528 U.S. 141, 148–49 (2000). In other words, because information from public records is “used in the stream of interstate commerce by various public and private entities,” its “sale or release into the interstate stream of business” constitutes interstate commerce under the Commerce Clause, *id.*, in both its negative and affirmative aspects, see *Camps Newfound*, 520 U.S. at 574 (“The definition of ‘commerce’ is the same when relied on to strike down or restrict state legislation as when relied on to support some exertion of federal control or regulation.”).

Not only are public records *things* in commerce, but the *service* of gathering records for compensation is itself commerce. Virginia’s position to the contrary—that “commerce” is limited to “the buying and selling of goods,” CA4 Br. at 43—rests on an “outdated and mistaken concept of what constitutes interstate commerce.” *Carbone*, 511 U.S. at 389. Even a century-old treatise on the public-records business recognized that one who

gathers records for pay does not merely “sell[] information,” but also “acts as an agent in making the search” and performs other services “for a compensation.” Niblack, *Abstracters of Title*, at 114; *see also* *FTC v. Titor Title Ins. Co.*, 504 U.S. 621, 625-26 (1992) (performing a “title search,” which “produces a chronological list of the public documents in the chain of title to the real property,” is a “major component[] of the [title] insurance company’s services”).

Given the wide variety of databases compiled from public records, and their importance across all sectors of the economy, the value of information-gathering services is even more apparent today than it was a century ago. The collection, compilation, and publication of public records is a service that today “inform[s] transactions in numerous fields”—“[r]eal estate financing, credit reporting, background checks, tenant screening, and even political campaigns.” Br. of Coalition for Sensible Public Records Access, *et al.* (pet. stage), at 6-7. And so, to meet the demand for their services, many businesses must make state-records requests “daily.” *Id.* at 6. Virginia’s experience bears that out: one state official “stated that she handles numerous out-of-state” public records requests “daily” and that “most of these requests are from data aggregators.” *VFOIA Report*, at 5.

Under this Court’s dormant Commerce Clause jurisprudence, it is irrelevant whether the economic activity at issue involves the offering of a service or the selling of traditional articles of commerce. *Camps Newfound*, 520 U.S. at 577 n.10; *see also* *Carbone*, 511 U.S. at 391 (treating the *service* of hauling and collecting waste as “the article of commerce”). What matters is whether the challenged law discriminates against businesses or individuals engaged in economic activity solely because they re-

side in a different state. The citizens-only restriction does that on its face.

**2. Discrimination in Effect.** The citizens-only restriction discriminates not only facially but in effect because it “favor[s] in-state economic interests over out-of-state interests.” *Brown-Forman*, 476 U.S. at 579. The Court has long recognized that “[i]n each case it is [the Court’s] duty to determine whether the statute under attack . . . will in its practical operation work discrimination against interstate commerce.” *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 201 (1994) (quoting *Best & Co. v. Maxwell*, 311 U.S. 454, 455-56 (1940)). The statute’s practical effect must also be evaluated “by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation.” *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989).

Virginia’s citizens-only restriction harms out-of-state businesses that have economic interests in retrieving public records in Virginia. By denying businesses in every other state the right to access Virginia public records but permitting identical in-state businesses to retrieve the exact same records, the restriction effectively places out-of-state businesses, like Hurlbert’s, at a decisive disadvantage compared to in-state businesses. Out-of-state businesses simply cannot participate in the market for Virginia public records without incurring added costs, such as hiring in-state proxies to retrieve the desired records, or becoming a Virginia citizen. The “economic effects” resulting from “depriv[ing] out-of-state businesses of access to a local market” are “more than enough to bring the [law] within the purview of the Commerce Clause.” *Carbone*, 511 U.S. at 389.



*Carbone* illustrates the point. There, the Court invalidated a flow-control ordinance requiring that all local trash be processed in the town's transfer station before leaving the municipality. *Id.* at 386. The Court explained that the local government's policy had the effect of establishing a local monopoly over the "initial processing step" of the town's garbage. *See id.* at 392. In doing so, the statute discriminated against out-of-state processing facilities and thus produced economic effects that "were interstate in reach." *Id.* at 389.

The citizens-only restriction operates in much the same way. It reserves the "initial processing step" of Virginia record retrieval to local businesses, denying out-of-state businesses primary access to the market for Virginia record retrieval just like the flow control ordinance in *Carbone* denied out-of-state haulers entry into the market for the initial processing the town's garbage. By "hoard[ing] a local resource"—public records as opposed to trash—"for the benefit of local businesses," *id.* at 392, the citizens-only restriction creates significant adverse effects on interstate commerce, as demonstrated by Hurlbert's decision to no longer do business in Virginia. CA4 J.A. 46A-47A, 66A, 70A. *See also Hicklin*, 437 U.S. at 533 ("[T]he Commerce Clause circumscribes a State's ability to prefer its own citizens in the utilization of . . . a state-owned resource [that] is destined for interstate commerce.").

*Toomer v. Witsell* further illustrates how Virginia's citizens-only policy produces discriminatory economic effects. The law challenged there required boats licensed to trawl for shrimp in South Carolina to dock at a South Carolina port and unload, pack, and stamp their catch before shipping or transporting it out of the state. 334 U.S. at 391. In striking down the law, this Court ex-



plained that "an inevitable concomitant of a statute requiring that work be done in South Carolina ... is to divert to South Carolina employment and business which might otherwise go to Georgia; the necessary tendency of the statute is to impose an artificial rigidity on the economic pattern of the industry." *Id.* at 403-04.

The same is true here. As in *Toomer*, Virginia's statute diverts to Virginia money (income earned from retrieving records) and jobs (for records-retrieval professionals like Hurlbert) that might otherwise go to businesses outside the state. This Court "has viewed with particular suspicion state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere." *S.-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 100 (1984).

Moreover, these discriminatory effects would be compounded "if not one, but many or every, State adopted" a similar restriction. *Healy*, 491 U.S. at 336. Interstate commerce in the document-retrieval market would likely come to a halt as the market moved "toward economic Balkanization." *Granholm*, 544 U.S. at 472. In-state interests would reign over out-of-state interests, stifling competition, impeding the flow of public information across state lines, and causing prices for information-gathering services to rise.

**3. Purpose.** Rather than evaluate Virginia's discrimination, the Fourth Circuit rescued the statute from rigorous review on the theory that its *purpose* was not to erect protectionist barriers but to combat government secrecy. Pet. App. 26a. Because the statute "is wholly silent as to commerce or economic interests," the court reasoned, it affects commerce only "incidental[ly]." *Id.* That reasoning is seriously flawed.

*First*, “the purpose of, or justification for, a law has no bearing on whether it is facially discriminatory” or discriminates in its effect. *Or. Waste*, 511 U.S. at 100. “A different view”—upholding a law “simply because it professes to be a health measure,” for example—“would mean that the Commerce Clause of itself imposes no limitations on state action ... save for the rare instance where a state artlessly discloses an avowed purpose to discriminate against interstate goods.” *Dean Milk Co. v. Madison*, 340 U.S. 349, 354 (1951).<sup>9</sup>

*Second*, the court of appeals wrongly focused on the statute’s “silen[ce] as to commerce.” True, the statute applies to commercial and non-commercial requesters alike, and some requesters seek public records for non-commercial purposes. But that fact cannot insulate Virginia’s law—which expressly targets non-citizens, including out-of-state businesses, for disfavored treatment.

Two related hypotheticals show why. Suppose State A enacts a licensing scheme authorizing its citizens to fish in state waters for any purpose, but barring all non-residents from obtaining fishing licenses. The statute makes no reference to “commerce.” On Virginia’s logic (and that of the court of appeals), a non-resident commercial fisherman could not sustain a dormant Com-

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<sup>9</sup> Even if legislative purpose were relevant to the dormant Commerce Clause inquiry, and even if the Virginia Freedom of Information Act’s sole purpose were to combat government secrecy, neither fact would justify the discrimination here. The *citizens-only restriction*—not the entire statute—is challenged here, and combatting government secrecy cannot be the purpose of the citizens-only restriction because it gives fewer people access to public records and, if anything, promotes greater secrecy than would exist in its absence.

merce Clause challenge, because the statute is "silent as to commerce or economic interests" (though it applies to them).

Now suppose that State B has two statutes, one for commercial fishing and the other for recreational fishing. Both bar non-residents from fishing. Virginia would have to acknowledge that the commercial-fishing statute is not silent as to commerce and would therefore be subject to, and fail, dormant Commerce Clause scrutiny if challenged by a non-resident commercial fisherman.

The problem is apparent: State A's statutory scheme—a scheme that functions just like Virginia's citizens-only restriction because it governs both commercial and non-commercial actors—has the same discriminatory effect on interstate commerce as State B's. And for that reason neither could survive scrutiny under the dormant Commerce Clause.

*Finally*, the court of appeals was simply wrong to proclaim that the citizens-only restriction's effects on interstate commerce are only "incidental." Viewed from Hurlbert's perspective, or from the perspective of all other out-of-state commercial requesters against whom the restriction is invoked, the adverse effect on interstate commerce is direct—and absolute: Out-of-state requesters are *denied* the right to inspect and copy Virginia public records, a right enjoyed, without exception, by Virginia businesses.

Those who seek public records in Virginia could, of course, hire Virginia-based intermediaries to get the records for them. But that only underscores the problem: Virginia's policy funnels business to Virginia records-retrieval providers for no legitimate economic purpose, drives up costs for out-of-state competitors like

Hurlbert (assuming that they would be able to maintain a presence in the Virginia market at all), and increases overall costs for consumers—all at the expense of the free national market that the Framers envisioned. See *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 533-38 (1949) (“This principle that our economic unit is the Nation ... has as its corollary that the states are not separable economic units.”).

Fair competition in the records-retrieval business, and the market for public information more generally, demands that in-state and out-of-state entities have access to information on the same terms. See Br. of Coalition for Sensible Public Records Access, *et al.* (pet. stage) 15, 19-22. In a market involving large streams of data and low margins, the need to hire an in-state proxy will often make access infeasible and invariably put out-of-state businesses at a competitive disadvantage. *Id.*

Moreover, the aggregate economic effects of restrictions like Virginia’s would be widespread and profound. Commercial interests dominate public records requests, including out-of-state requests. See Coalition of Journalists for Open Government, *Frequent Filers: Businesses Make FOIA Their Business* (2006) (concluding that at least two-thirds of all public records requests are “from commercial requesters” and that “more than 12 percent” are from “professional requesters,” *i.e.*, those whose business is gathering public records); *VFOIA Report*, at 5 (Virginia official stating that “most [out-of-state records] requests are from data aggregators”). For those in the information-gathering industry, “[p]ublic records are the essence of [their] business” and the “lifeblood of [their] commercial activity.” Br. of Coalition for Sensible Public Records Access, *et al.* (Pet. Stage), at 6.



The completeness and reliability of data on which these companies depend—and thus the value of their services—are hindered by laws that wall off entire states from the marketplace for public information. For instance, an employer cannot, in a mobile society like ours, rely on a background check that omits criminal convictions in Virginia. Nor can a lender rely on a credit report that omits—or fails to timely update—Virginia civil judgments or tax liens. *See id.* at 16-19. Out-of-state records retrieval businesses of all stripes need public records from Virginia to compete in the interstate market for information, but the citizens-only restriction makes it impossible for them to compete on an equal basis with Virginia businesses.

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Because the citizens-only restriction discriminates against out-of-state economic interests both facially and in effect, “the virtually *per se* rule of invalidity provides the proper legal standard here.” *Or. Waste*, 511 U.S. at 100. Thus, to save the law, the state bears the burden of showing that it “has no other means to advance a legitimate local purpose.” *United Haulers*, 550 U.S. at 338-39. Because Virginia has not come close to carrying that burden (*see infra* Part IV), the restriction is invalid under the dormant Commerce Clause.

### **III. The Citizens-Only Restriction Violates the Privileges and Immunities Clause.**

The Constitution’s Privileges and Immunities Clause, also known as the Comity Clause, provides that “[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.” U.S. Const. art IV § 2. As its text indicates, the Clause places “the citizens of each State upon the same footing with



citizens of other States, so far as the advantages resulting from citizenship in those States are concerned." *Paul v. Virginia*, 75 U.S. 168, 180 (1869).

Virginia's citizens-only restriction on the right to access public records runs afoul of that command. The Clause "outlaw[s] classifications based on the fact of non-citizenship unless there is something to indicate that non-citizens constitute a peculiar source of the evil at which the statute is aimed." *Toomer*, 334 U.S. at 398. Throughout this litigation, Virginia has made no attempt to identify *any* "peculiar source of evil" that might justify its citizens-only restriction on records access. Instead, the state has maintained that it may engage in naked discrimination against non-citizens and escape scrutiny under the Privileges and Immunities Clause. That gambit fails in several ways.

**1. Common Calling.** This Court has long recognized that "one of the privileges which the Clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State." *Supreme Court of N.H. v. Piper*, 470 U.S. 274, 280 (1985) (quoting *Toomer*, 334 U.S. at 396). The right of nonresidents to "ply their trade, practice their occupation, or pursue a common calling" unhindered by state boundaries, *Hicklin*, 437 U.S. at 524, is "one of the most fundamental of those privileges protected by the Clause." *United Bldg.*, 465 U.S. at 219. This Court has struck down laws that preferred residents of a city for municipal construction jobs, *id.*, prohibited non-Alaskans from obtaining work on the Trans-Alaska oil pipeline, *Hicklin*, 437 U.S. at 524, charged Georgia fisherman much higher licensing fees for shrimping in South Carolina waters, *Toomer*, 334 U.S. at 385, and charged higher

licensing fees to out-of-state salespeople seeking to hawk their wares in Maryland, *Ward*, 79 U.S. at 430.

Because Hurlbert “collects and synthesizes information for a particular audience and sells it for profit,” and because “Virginia will continue to deny him access to much of this information while providing it to Virginia residents,” he has made out a “classic common-calling claim under the Privileges and Immunities Clause.” Pet App. 72a (Gregory, J., concurring). Virginia’s law cuts off his ability to gather records that originate in Virginia, and does so solely because of his citizenship. Virginia’s defense—that it has no obligation to, in its words, make Hurlbert’s “business model” “profitable” in light of his “decision to live elsewhere,” BIO 24—makes sense only if one discards the Constitution’s command that “the citizens of each State” be placed “upon the same footing with citizens of other States.” *Paul*, 75 U.S. at 180.

The right to a “common calling” means simply the “right [to] engag[e] in lawful commerce, trade, or business,” something that “the clause plainly and unmistakably secures.” *Ward*, 79 U.S. at 430; *see also* 1 Blackstone, *Commentaries on the Laws of England* 415 (1765) (discussing the common-law right that “every man might use what trade he pleased”). Despite Virginia’s suggestion to the contrary (BIO 23), Hurlbert’s line of work is just as worthy of protection as that of traveling salesmen, pipeline workers, or shrimpers because the nationwide availability of public records is so “important to the national economy.” *Piper*, 470 U.S. at 281. His profession has existed since the early Republic, *see, e.g., Smith v. Fisher*, 2 S.C. Eq. 275, 277 (1804) (party “employed a professional gentleman to investigate his titles, and search the records”), and is essential to a functioning real estate market, *see Ticor Title*, 504 U.S. at 625-26 (noting that

searches of public documents are central to multibillion-dollar title-insurance industry).

In *Toomer*, this Court struck down, on Privileges and Immunities grounds, a South Carolina statute requiring shrimpers to pay higher licensing fees for shrimp boats than residents. 334 U.S. at 403. Calling this scheme “virtually exclusionary,” *Toomer* held that it interfered with out-of-state shrimpers’ ability to pursue their common calling and was therefore invalid. *Id.* at 397, 403. Virginia’s law is not just “virtually” exclusionary. It is actually—and completely—exclusionary. Whereas the South Carolina scheme imposed substantially higher costs on out-of-state citizens, Virginia’s law categorically bars non-Virginians from the market. Accordingly, “it is incumbent upon the state to prove that the statute withstands heightened scrutiny.” Pet. App. 72a (Gregory, J., concurring).

In the view of Virginia and the court below, however, this discrimination against out-of-state business escapes Privileges-and-Immunities-Clause scrutiny because “[o]n its face” the statute “addresses no business, profession, or trade” and its effect on Hurlbert’s business is therefore “incidental.” Pet. App. 17a-18a. This rationale is wrong for two reasons. *First*, as already discussed (at 32-34) with respect to the Commerce Clause, Virginia’s citizens-only restriction does not impose an “incidental” burden on Hurlbert’s business in Virginia. Quite the contrary—it prevents him from doing business there altogether.

*Second*, nothing in the history of Privileges and Immunities Clause jurisprudence suggests that a state may burden a common calling so long as it manages to avoid saying that that is what it is doing. *Toomer* involved a commercial licensing scheme. But a hypothetical statute

that categorically barred non-citizens from access to South Carolina shrimp would have been equally unconstitutional. To say, as the court of appeals did, that Virginia regulates only records, not the business of records retrieval, is like saying that the hypothetical statute regulates only fish, not commercial fishing. That is senseless formalism. See Pet. App. 72a (Gregory, J., concurring) (“A statute that discriminates against a nonresident’s ability to access information therefore implicates the right to pursue a common calling in the Twenty-First century in much the same way that it would if it burdened an angler’s ability to catch fish, or a cabby’s ability to drive fares, in the Twentieth.”) (citations omitted).

What matters under the Comity Clause is whether the citizens-only restriction has the “practical effect” of discriminating against out-of-state businesses like Hurlbert’s. See *Hillside Dairy Inc. v. Lyons*, 539 U.S. 59, 67 (2003). The Clause condemns “laws which in their practical operation materially abridge or impair the equality of commercial privileges.” *Chalker v. Birmingham & N.W. Ry.*, 249 U.S. 522, 527 (1919); *Austin v. New Hampshire*, 420 U.S. 656, 664 (1975) (putting aside “theoretical distinctions” and instead emphasizing “actual effect”). Certainly, the effect here is far more direct than in *Lunding v. N.Y. Tax Appeals Tribunal*, 522 U.S. 287, 302, 315 (1998), which invoked the common-calling privilege to strike down a state-income tax law that precluded non-New Yorkers from deducting alimony payments. The Court’s reasoning was that the tax—although not directed at any particular occupation or business—would effectively discriminate between resident and non-resident workers. *Id.* at 315.

The “practical effect” of Virginia’s law is clear: to deny noncitizens the ability to pursue the records-retrieval



business in Virginia on an equal footing, and to immunize Virginia businesses from competitors like Hurlbert. Because it “interferes with [Hurlbert’s] right to pursue a livelihood in a State other than his own,” without substantial justification, Virginia’s law “must yield.” *Baldwin v. Fish & Game Comm’n of Mont.*, 436 U.S. 371, 386 (1978).

2. **Property.** Virginia’s position that it may withhold *public real estate records* from Hurlbert—solely because he is not a Virginian—is indefensible in light of both history and precedent. Had Hurlbert requested copies of land records from a county surveyor in Virginia in 1789, there is no question that he would have been entitled to them. Virginia not only barred “any county surveyor” from “withhold[ing]” copies of land surveys from “any person,” but extended this right to “*any person or persons, not resident within this state,*” provided they had paid the required copying fees or given adequate security.<sup>10</sup>

Thus, in *Preston v. Brown*, 20 Va. (6 Munf.) 271 (1819), the Virginia Supreme Court affirmed a jury’s damages verdict against the Surveyor of Washington County, who had refused to provide the plaintiff with copies of land surveys that were “of record in the Surveyor’s books,” even though the plaintiff was “then and there ready to pay the fees.” *Id.* at 272. The court held that it was “the official duty of the surveyor of a County, to furnish, in reasonable time, when demanded, copies of all surveys.” *Id.* at 271. The importance of that rule, the plaintiff had argued, followed from the importance of

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<sup>10</sup> 12 *Hening’s Statutes at Large* 589-90 (1787) (emphasis added; codified in Va. Code of 1819, Ch. 86 § 69).



public records in securing property rights—"the Surveyor's office," like the "offices of the Register and the Clerks are public offices, for *recording, and thereby preserving*, certain muniments of titles and rights." *Id.* at 275 (emphasis added).<sup>11</sup>

Since the recording system's origin in seventeenth-century Virginia and Massachusetts, access to public records has been inseparable from the "ability to transfer property"—a privilege that this Court has long held is protected under the Privileges and Immunities Clause. *Baldwin*, 436 U.S. at 387. "A public, enduring, authoritative, and transparent record of all land ownership provides a vital information infrastructure that has proven indispensable in facilitating not only mortgage finance, but virtually all forms of commerce." Peterson, *Demystifying the Mortgage Electronic Registration System's Land Title Theory*, 53 Wm. & Mary L. Rev. 111, 115 (2011). In short, "the title system, or the system for protecting ownership rights, is clearly fundamental to the operation of land markets." Miceli, *Title Systems and Land Values*, 45 J. L. & Econ. 565, 565 (2002).

In the Founding Era, as now, "title was a matter of public notoriety, founded upon public records, and upon transactions in the face of the world." *Lockyer v. De Hart*, 1 Halst. 450, 455 (N.J. 1798). The recording sys-

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<sup>11</sup> The Framers had direct experience with the importance of public land records. Jefferson wrote about Virginia's elaborate, publicly supervised process for securing land grants in his *Notes on the State of Virginia*, 224-226 (1787), and Washington was himself the official surveyor of Culpeper County, Virginia. See Washington, *Journal of My Journey Over the Mountains* (1892); see also Tucker, *Blackstone's Commentaries*, III.D (1803) (noting Virginia surveyors' obligation to record entries "for persons not inhabitants of the county").

tem's "plain intention" was "to give notice, through the medium of the county records, to persons about to purchase." *Jackson ex dem. Ctr. v. Campbell*, 19 Johns. 281, 283 (N.Y. 1822). The system creates a practical need to search the records—or hire someone to search—before engaging in a transaction. *Youst v. Martin*, 3 Serg. & Rawle 423, 430 (Pa. 1817) ("In consequence of this law, it is the custom of purchasers to search the records before they pay their money."). The consequences of failing to do so could be catastrophic. *Evans v. Jones*, 1 Yeates 172, 173 (Pa. 1792) ("[A]ny man may discover the incumbrances, if he will take the trouble of searching the proper offices. If he will not, he must impute the consequences to his own laches."). It was for this reason—because property rights depend in a very real sense on access to public records—that "every one has a right to inspect" them. *Jackson v. McGavock*, 26 Va. 509, 513 (1827).

It has always been clear that the Privileges and Immunities Clause protects the right to "take, hold and dispose of property, either real or personal," across state lines. *Corfield v. Coryell*, 6 F. Cas. 546, 552 (C.C. E.D. Pa. 1825) (opinion of Washington, J.). "[T]he first reported judicial construction of the Privileges and Immunities Clause" explained that "one of the chief motivations for the inclusion of the analogous provision in the Articles was to secure the rights of real property ownership." Upham, *Corfield v. Coryell and the Privileges and Immunities of American Citizenship*, 83 Tex. L. Rev. 1483, 1493 (2005) (discussing *Campbell v. Morris*, 3 H. & McH. 535 (Md. 1797)); Lash, "Privileges and Immunities" As an Antebellum Term of Art, 98 Geo. L.J. 1241, 1258-72 (2010). Access to property records, as a necessary corollary to "the ability to transfer property," is thus a right protected by the Privileges and Immunities Clause. *Baldwin*, 436 U.S. at 387. By refusing to provide equal

access to copies of property records, Virginia has refused to place non-Virginians on the "same footing" with respect to "the acquisition and enjoyment of property." *Paul*, 75 U.S. at 180, in violation of the Privileges and Immunities Clause.

**3. Public Proceedings.** Petitioner McBurney requested public records concerning another basic right protected by the Comity Clause: access to public proceedings. He requested records of *his own case* with the Virginia Division of Child Support Enforcement—before which he sought an enforcement petition after his former wife defaulted on her child-support obligations—as well as information about *the general rules or policies* that the agency uses when it processes cases like his. Virginia maintains that it may deny him this basic information about his case solely because he is not a citizen of Virginia.

If McBurney's case had been before a Virginia court, the Privileges and Immunities Clause would indisputably preclude Virginia's discrimination. The Clause "secures citizens of one state the right to resort to the courts of another, equally with the citizens of the latter state," *Mo. Pac. R. Co. v. Clarendon Boat Oar Co.*, 257 U.S. 533, 535 (1922), which means that—at a minimum—the proceedings "must remain open to such litigants on the same basis." *Miles v. Ill. Cent. R. Co.*, 315 U.S. 698, 704 (1942). Nonresidents cannot enjoy anything close to equal access to a state's proceedings if their in-state adversaries can get information—whether about the general rules of the game, or the specifics of the case—that nonresidents cannot.

An information asymmetry between adversaries based solely on state citizenship would be intolerable in any type of dispute. But it is especially pernicious here

because the Framers recognized the privilege of “enforcing debts” as one of the central privileges protected by the Privileges and Immunities Clause. Natelson, *The Original Meaning of the Privileges and Immunities Clause*, 43 Ga. L. Rev. 1117, 1187 (2009); see Campbell, 3 H. & McH. at 554 (“[A]s creditors, they shall be on the same footing with the state creditor”); *Hadfield v. Jame-son*, 16 Va. (2 Munf.) 53, 54 (1811) (rejecting view that only Virginia citizens could pursue certain debt-collection remedies in Virginia as inconsistent with the Privileges and Immunities Clause) (Tucker, J.)). One of Article IV’s chief concerns was solving the problem of collecting debts from “negligent and evil minded debtors” who absconded across state lines. Sachs, *Full Faith and Credit in the Early Congress*, 95 Va. L. Rev. 1201, 1222 (2009) (quoting colonial statute). Indeed, one impetus for the Full Faith and Credit Clause was that records needed for interstate collection proceedings were often “stuck in another colony’s archives.” *Id.* But if Virginia’s position prevails here, the outcome will be that the in-state *debtor* who has defaulted will enjoy a right to public records relating to the proceedings that the *creditor* (McBurney) does not, solely by virtue of state citizenship.<sup>12</sup>

The outcome should not be different merely because McBurney’s case was not before a court but before an agency that operates “through a case-by-case adjudica-

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<sup>12</sup> The “non-payment of child support, particularly in interstate cases, is a widespread problem,” *Kansas v. United States*, 214 F.3d 1196, 1199 (10th Cir. 2000), and can often be resolved through access to public records. See Calhoun, *Interstate Child Support Enforcement System: Juggernaut of Bureaucracy*, 46 Mercer L. Rev. 921, 958 (1995).



tive system of enforcement strategies.” Petersen, *Enforcing Child Support*, 11 J. Contemp. Legal Issues 441, 442 (2000). To be sure, such proceedings “were all but unheard of in the late 18th century” and the Framers “could not have anticipated the vast growth of the administrative state.” *Fed. Mar. Comm’n v. S. Carolina State Ports Auth.*, 535 U.S. 743, 755 (2002). But, what Justice Jackson recognized a half-century ago is even more true now—“more values today are affected by [agency] decisions than by those of all the courts.” *FTC v. Ruberoid Co.*, 343 U.S. 470, 487 (1952).

The Privileges and Immunities Clause should not be read to allow states to bar citizens of other states from equal access to their administrative proceedings, which necessarily includes basic information about how those proceedings are conducted. A contrary rule would leave important property rights unprotected for no good reason. See Howell, *The Privileges and Immunities of State Citizenship* 48 (1918) (discussing property-based basis for court access privilege). The same rationales supporting court access as a privilege of state citizenship protected by the Clause—namely, that it is “the right conservative of all other rights,” including, especially, the right to private property and the enforcement of debt obligations—apply with full force to administrative proceedings. *Chambers v. Baltimore & O.R. Co.*, 207 U.S. 142, 148-49 (1907); cf. *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972) (First Amendment right to petition extends to both courts and administrative agencies); *Corfield v. Coryell*, 6 F. Cas. at 552 (court-access privilege applies to “actions of any kind”).

**4. Equal Access to Information.** The right to access public information on equal terms is itself a privilege protected by the Privileges and Immunities Clause. Jus-



tice Blackmun's opinion in *Baldwin* explained that Montana could constitutionally charge non-Montanans higher license fees for purely recreational elk hunting because "[e]quality in access to Montana elk is not basic to the maintenance or well-being of the Union." 436 U.S. at 388. Public records are not elk. "Equality in access" to public information is "basic to the maintenance or well-being of the Union." As the Full Faith and Credit Clause demonstrates, the Framers believed that the movement of "public, Acts, Records, and Judgments" across state lines was "'fundamental' to the promotion of interstate harmony." *United Bldg.*, 465 U.S. at 218 (quoting *Baldwin*, 436 U.S. at 388). Modern public records laws carry on the longstanding "general right to inspect and copy public records and documents," *Nixon*, 435 U.S. at 597-98, recognized at both English and American common law—a right that has, "at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign." *Corfield*, 6 F. Cas. at 551; see Massachusetts Body of Liberties of 1641, art. 48 ("Every inhabitant of the Country shall have free liberty to search and review any rolls, records or registers of any Court or office.").

Because public records are "important to the national [information] economy," *Piper*, 470 U.S. at 281, and vital to securing property and other fundamental interests, the Constitution does not permit a single state, whatever its motives, to erect a barrier to the free flow of information across state lines. "No state is an island." *Lee v. Minner*, 458 F.3d 194, 199 (3d Cir. 2006). Actions by states have national effects. In large part because our Constitution binds the states together in a Nation, states' actions reach outward to affect citizens of other states—from child-support proceedings and property transactions to regulatory decisions with broad social

and political consequences. Public records contain facts about these and countless other matters. And “[f]acts, after all, are the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs.” *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2666 (2011). In the information age, the freedom to gather public facts nationwide is just as, if not more, “important to the ‘maintenance or well-being of the Union,” *Piper*, 470 U.S. at 281, as equal access to shrimping or municipal construction jobs. Accordingly, “the right of noncitizens to access to public records is a right protected by the Privileges and Immunities Clause.” *Lee*, 458 F.3d at 200 (striking down Delaware’s citizens-only restriction).

To be clear, petitioners are *not* asserting a freestanding “constitutional right to have access to particular government information.” *Houchins v. KQED, Inc.*, 438 U.S. 1, 14 (1978) (plurality opinion) (“The Constitution itself is [not] a Freedom of Information Act.”). Virginia could decide “not to give out [this] information at all.” *Los Angeles Police Dept. v. United Reporting Pub. Corp.*, 528 U.S. 32, 40 (1999). But once it *chooses* to release information, Virginia must do so on terms consistent with the Constitution. *Id.*; see *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2666 (2011) (discussing *United Reporting* opinions). And because the Constitution “outlaw[s] classifications based on the fact of non-citizenship” absent good reasons, *Toomer*, 334 U.S. at 398, Virginia may not deny access to public information “based on the fact of citizenship”—particularly where doing so interferes with non-Virginians’ ability to earn a living, secure property rights, and access public proceedings on equal terms.

#### IV. Virginia Has Failed to Articulate, Much Less Demonstrate, Any Valid Reason for Its Discrimination.

Both at summary judgment and on appeal, Virginia has advanced only one justification for its citizens-only restriction: that the administrative costs required to give non-Virginians access to public records would reduce resources available for Virginians. The state, however, offered not a shred of evidence to support that contention. And it is factually wrong—not least because Virginia law authorizes the state to recoup its costs through fees.

Moreover, because the citizens-only restriction is so readily circumvented through in-state proxies, it does not *decrease* the burden on the state; it just *increases* the burden on non-citizens. Even if Virginia's justification had any basis in fact, it would provide no support for the citizens-only restriction because the restriction turns not on the *burden* posed by the request, but on the *citizenship* of the requester—an unconstitutional distinction.

1. ***Discriminatory Justification.*** A state may not use discrimination based on state citizenship as a tool to pursue any policy objective. Rather, discrimination is justified only if the state can show that non-citizens “constitute a peculiar source of the evil at which the statute is aimed.” *Toomer*, 334 U.S. at 398. *Toomer* found no need to address the validity of the state's asserted interest in protecting its shrimp supply because, under the Privileges and Immunities Clause, even “valid objectives” do not justify the state's discrimination absent a “substantial reason for the discrimination beyond the mere fact that they are citizens of other States.” *Id.* at 396, 398. The same is true under the Commerce Clause. Although New Jersey defended its ban on the transportation of solid waste as an environmental measure, this Court in

*Philadelphia v. New Jersey* considered the state's motive "not ... relevant" to the constitutional question. 437 U.S. at 626. "[W]hatever New Jersey's ultimate purpose," the Court wrote, its discrimination against out-of-state articles of commerce was impermissible absent "some reason, apart from their origin, to treat them differently." *Id.* at 626-27.

As in *Toomer* and *Philadelphia*, Virginia's citizens-only restriction "frankly discriminates against non-residents," and its justification for that discrimination has nothing to do with any harm "peculiar" to non-citizens. *Toomer*, 334 U.S. at 396-97. All requests for records—not just those from non-Virginians—impose administrative costs on state officials, and the state has made no attempt to argue, let alone prove based on actual experience, that the requests of non-citizens are peculiarly expensive or difficult to process. Rather, the interest advanced by the state rests on nothing more than its concern that providing public documents to citizens of other states would "consum[e] the time and resources that would otherwise be available" to its own citizens. CA4 Br. at 41. Virginia's only basis for singling out non-citizens is thus "the mere fact that they are citizens of other States." *Toomer*, 334 U.S. at 396. That distinction not only fails to justify the state's facial discrimination, but is itself "constitutionally unacceptable." *Zobel v. Williams*, 457 U.S. 55, 65 (1982).

Virginia argued below that allocating its administrative resources for the exclusive use of Virginians is justified because public records "are the property of the jurisdiction's citizens," which the state may legitimately "conserve ... for the public's benefit." CA4 Br. 42. That argument echoes claims by states in past cases of the authority to grant "a preferred right of access" to natural



resources within their borders. *Philadelphia*, 437 U.S. at 627. This Court has long rejected such claims, holding that states may not restrict the flow of resources on the ground that “they are needed by the people of the State.” *Id.* (quoting *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1, 10 (1928)); see *Missouri v. Holland*, 252 U.S. 416, 434 (1920) (Holmes, J.) (“To put the claim of the State upon title is to lean upon a slender reed.”). To the contrary, “whenever such hoarding [of resources] impedes interstate commerce” or “interferes with a non-resident’s right to pursue a livelihood,” the state’s restrictions “must yield.” *Baldwin*, 436 U.S. at 385-86.

Virginia’s argument here is, if anything, less compelling than those this Court has earlier rejected. Although Virginia has asserted that its official records are “the public’s treasure,” CA4 Br. 42, it provides only *copies* of those records to requesters. Unlike South Carolina’s fisheries, *Toomer*, 334 U.S. 385, Alaska’s oil reserves, *Hicklin*, 437 U.S. 518, or Montana’s elk, *Baldwin*, 436 U.S. at 388, Virginia’s public records face no risk of depletion by opening them to non-citizens.

**2. Lack of Evidence.** Virginia has not shown that responding to non-citizens’ record requests would impose *any* cost on the state. As Virginia has acknowledged, the statute allows agencies to recoup the cost of responding to records requests by charging fees to requesters, including any “actual cost incurred in accessing, duplicating, supplying, or searching for the requested records.” Va. Code § 2.2-3704(F); see CA4 Br. at 42 (acknowledging “that the government can recoup its copying and administrative costs”). Because the state is entitled to pass on its costs to out-of-state requesters, the citizens-only restriction “can hardly be justified on the ground that responding to requests for records from foreigners



would overwhelm limited government resources.” Bonner, *Annual Survey of Virginia Law*, 33 U. Rich. L. Rev. 727, 731 (1999).

This Court in *Barnard v. Thorstenn* rejected an argument nearly identical to Virginia’s argument here. 489 U.S. 546, 556 (1989). The Virgin Islands defended its residence requirement for bar admission on the ground that it did “not have the resources and personnel for adequate supervision of the ethics of a nationwide bar membership.” *Id.* The Court, however, noted that because Bar members pay dues, “[t]here is no reason to believe that the additional moneys received from nonresident members will not be adequate to pay for any additional administrative burden.” *Id.* So, too, has Virginia failed to show that the cost of producing records for citizens of other states will pose a burden, given that it may fully recover its costs.

Virginia nevertheless argued below that the time spent responding to requests from non-Virginians—even if fully compensated—might consume resources that otherwise could be devoted to Virginians. CA4 Br. 42. Virginia submitted no evidence on summary judgment, however, to support its speculation that records requests by non-citizens are likely to be a substantial burden on state officials, or that those officials are too thinly stretched to absorb the additional demand. To the contrary, some Virginia agencies report that they voluntarily honor out-of-state requests because they do not consider them burdensome. *See, e.g., VFOIA Report* at 6 (agency official reporting that “out-of-state requests” are “not a big problem for them”). There is thus no basis for concluding that the burden of processing out-of-state records requests would be greater than the burden of supervising out-of-state lawyers, *Barnard* 489 U.S. 546,

or processing out-of-state fishing licenses, *Toomer*, 334 U.S. 385.

That is especially true because state agencies can often provide records in ways that are virtually *cost-free*—by, for example, exercising “the option of posting the records on a website or delivering the records through an electronic mail address provided by the requester.” Va. Code § 2.2-3704(G). Indeed, the real property records that Hurlbert requests “are often copies of computer readable databases.” CA4 JA 47A.

There are other good reasons to doubt that Virginia’s predictions will materialize. Forty-seven states and the District of Columbia have public records laws without enforcing citizens-only restrictions. *See* Br. of Citizens for Responsibility and Ethics, *et al.* (pet. stage) at 12 n.9 (citing statutes). Yet there is no evidence that those states have been unable to effectively provide services to their own citizens. And “there has been no clamoring for changing the law in those states.” *VFOIA Report* at 6. Indeed, the trend among states has been to *eliminate* the remaining citizens-only restrictions from state public records laws. At least eight states that previously had such restrictions have dropped them and two others have adopted policies of non-enforcement, without evidence of harm to their ability to make access available to their citizens. *See supra* 11 n.5 and 12 n.6. Today, only Arkansas and Tennessee actively enforce restrictions like Virginia’s. *See supra* 11 n.4. And of those two, Arkansas recently agreed to provide records to citizens of other states in response to a constitutional challenge, and Tennessee (which is also defending a constitutional challenge) has pending legislation to extend the right of records access to non-citizens. *Id.*

Virginia's failure of proof is fatal to its argument. A state's burden in justifying facial discrimination against citizens of other states requires more than a state's speculation about possible harm, as under rational-basis review. Rather, Virginia must prove that allowing citizens of other states the same privileges it grants its own citizens would *actually* (not hypothetically) harm a substantial state interest. See *Toomer*, 334 U.S. at 385. This Court has routinely struck down discriminatory state laws when states have failed to produce such evidence. See, e.g., *Piper*, 470 U.S. at 285 (rejecting state's proffered justification, that non-resident attorneys would be less familiar with local rules, as unsupported by evidence); *Hicklin*, 437 U.S. at 526 (holding the Alaska Hire statute unconstitutional where "no showing was made on [the] record that nonresidents were responsible for an Alaska job shortage"); *Toomer*, 334 U.S. at 398 (finding greater costs insufficient to justify discrimination where "[n]othing in the record indicates . . . that the cost of enforcing the laws against [non-citizens] is appreciably greater, or that any substantial amount of the State's general funds is devoted to shrimp conservation"). And, as discussed above (at 24), the state faces an even heavier burden under the dormant Commerce Clause, which subjects facially discrimination laws to a "virtually per se rule of invalidity." *Philadelphia*, 437 U.S. at 624.<sup>13</sup>

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<sup>13</sup> The court below rejected the virtual per se rule in favor of the *Pike v. Bruce Church* balancing test, which asks if the burden on commerce is "clearly excessive in relation to the putative local benefits." 397 U.S. 137, 142 (1970). But it declined to apply even that test because, in its view, petitioners "waived any challenge to that component of the district court's analysis." Pet. App. 27a. The court was wrong on both counts. First, *Pike* applies only when a statute "regulates even-handedly to effectuate a legitimate local public interest."

(continued ...)

In the absence of any evidence, Virginia's "bald assertion" that non-resident FOIA requests would overwhelm state agencies and interfere with their ability to operate cannot justify the state's policy of discrimination. *Mullaney v. Anderson*, 342 U.S. 415, 418 (1952).

**3. Less Restrictive Means.** Even if Virginia could demonstrate that records requests by non-citizens would impose a substantial administrative burden, that would not justify the decision to single out non-citizens for differential treatment. The purported goal of avoiding administrative burdens has nothing to do with the requesters' citizenship.

To justify facial discrimination under the Privileges and Immunities Clause, a state must prove that the challenged law bears a "substantial relationship to the State's objective." *Piper* at 284. Similarly, the dormant Commerce Clause requires the state to "demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest." *Carbone*, 511 U.S. at 392. Virginia's discrimination here bears *no* relationship—substantial or otherwise—to its purported objective. The state imposes *no* limit on requests by citizens, no matter how burdensome, but claims that it is free to exclude *all* out-of-state requesters even when their re-

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*Id.* Virginia's law is not even-handed. And discrimination is not a legitimate interest. *Second*, petitioners made both those points below and argued, alternatively, that the statute fails under *Pike* because there are "no countervailing legitimate concerns to justify limiting access to public records," CA4 Br. 13-14, "fair[] notice" of our position. *Nelson v. Adams*, 529 U.S. 460, 469 (2000). In any event, this Court has reached the *Pike* test in pure "facial challenge" cases. See *Gen. Motors v. Tracy*, 519 U.S. 278, 298 n.12 (1997). Because Virginia has yet to identify *any* "legitimate concerns," its restriction would fail even under *Pike*.



quests would impose no burden. *See Toomer*, 334 U.S. at 385 (contrasting South Carolina's restriction on non-citizens with its lack of similar limits for citizens).

Even if Virginia could show some connection between the citizenship of a requester and the burden of a request, it would not justify the "drastic" remedy of "total exclusion." *Toomer*, 334 U.S. at 398. Whenever possible, a state must seek to "achieve its legitimate goals without unnecessarily discriminating against nonresidents." *Id.* at 284 n.17. If Virginia could demonstrate that out-of-state requests posed a peculiar burden, that would justify at most imposing limits on *burdensome* requests or allowing itself more time to respond to such requests. Alternatively, Virginia could address any additional costs associated by charging those costs to the requester, as the statute already authorizes. This Court has consistently endorsed such a strategy, at least where the fees clearly reflect the actual costs attributable to non-citizens. *See Mullaney*, 342 U.S. at 418; *Piper*, 470 U.S. at 287. But Virginia's decision to *totally* exclude citizens of other states, regardless of burden, does "not bear a reasonable relationship to the high degree of discrimination practiced upon citizens of other States," *Toomer*, 334 U.S. at 284, and for that reason alone is unconstitutional.



## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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## **APPENDIX**

## STATUTORY APPENDIX

Virginia Code § 2.2-3704 provides in relevant part:

**Public records to be open to inspection; procedure for requesting records and responding to request; charges; transfer of records for storage, etc.**

A. Except as otherwise specifically provided by law, all public records shall be open to inspection and copying by any citizens of the Commonwealth during the regular office hours of the custodian of such records. Access to such records shall not be denied to citizens of the Commonwealth, representatives of newspapers and magazines with circulation in the Commonwealth, and representatives of radio and television stations broadcasting in or into the Commonwealth. The custodian may require the requester to provide his name and legal address. The custodian of such records shall take all necessary precautions for their preservation and safekeeping.

\* \* \*

F. A public body may make reasonable charges not to exceed its actual cost incurred in accessing, duplicating, supplying, or searching for the requested records. No public body shall impose any extraneous, intermediary or surplus fees or expenses to recoup the general costs associated with creating or maintaining records or transacting the general business of the public body. Any duplicating fee charged by a public body shall not exceed the actual cost of duplication. The public body may also make a reasonable charge for the cost incurred in supplying records produced from a geographic information system at the request of anyone other than the owner of the land that is the subject of the request. However, such charges shall not exceed the actual cost to the public body in supplying such records, except that the public

body may charge, on a pro rata per acre basis, for the cost of creating topographical maps developed by the public body, for such maps or portions thereof, which encompass a contiguous area greater than 50 acres. All charges for the supplying of requested records shall be estimated in advance at the request of the citizen.

G. Public records maintained by a public body in an electronic data processing system, computer database, or any other structured collection of data shall be made available to a requester at a reasonable cost, not to exceed the actual cost in accordance with subsection F. When electronic or other databases are combined or contain exempt and nonexempt records, the public body may provide access to the exempt records if not otherwise prohibited by law, but shall provide access to the nonexempt records as provided by this chapter.

Public bodies shall produce nonexempt records maintained in an electronic database in any tangible medium identified by the requester, including, where the public body has the capability, the option of posting the records on a website or delivering the records through an electronic mail address provided by the requester, if that medium is used by the public body in the regular course of business. No public body shall be required to produce records from an electronic database in a format not regularly used by the public body. However, the public body shall make reasonable efforts to provide records in any format under such terms and conditions as agreed between the requester and public body, including the payment of reasonable costs. The excision of exempt fields of information from a database or the conversion of data from one available format to another shall not be deemed the creation, preparation or compilation of a new public record.

H. In any case where a public body determines in advance that charges for producing the requested records are likely to exceed \$200, the public body may, before continuing to process the request, require the requester to agree to payment of a deposit not to exceed the amount of the advance determination. The deposit shall be credited toward the final cost of supplying the requested records. The period within which the public body shall respond under this section shall be tolled for the amount of time that elapses between notice of the advance determination and the response of the requester.

I. Before processing a request for records, a public body may require the requester to pay any amounts owed to the public body for previous requests for records that remain unpaid 30 days or more after billing.



# **RESPONDENT'S BRIEF**

JAN 24 2013

CLERK

In The  
**Supreme Court of the United States**

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MARK J. McBURNEY and ROGER W. HURLBERT,

*Petitioners,*

v.

NATHANIEL L. YOUNG, JR., in his Official  
Capacity as DEPUTY COMMISSIONER AND  
DIRECTOR, DIVISION OF CHILD SUPPORT  
ENFORCEMENT, COMMONWEALTH OF  
VIRGINIA, and THOMAS C. LITTLE, DIRECTOR,  
REAL ESTATE ASSESSMENT DIVISION,  
HENRICO COUNTY, VIRGINIA,

*Respondents.*

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**On Writ Of Certiorari To The  
United States Court Of Appeals  
For The Fourth Circuit**

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January 24, 2013

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## STATEMENT OF THE CASE

In 1968, the General Assembly of the Commonwealth of Virginia enacted the Virginia Freedom of Information Act (VFOIA). *See* 1968 Va. Acts 690. The purpose of the enactment was then, and remains, “ensur[ing] the people of the Commonwealth ready access to public records in the custody of a public body or its officers and employees, and free entry to meetings of public bodies wherein the business of the people is being conducted.” Va. Code Ann. § 2.2-3700(B); *see* 1976 Va. Acts 546. For “[t]he affairs of government are not intended to be conducted in an atmosphere of secrecy since at all times the public is to be the beneficiary of any action taken at any level of government.” Va. Code Ann. § 2.2-3700(B).

As adopted, VFOIA provided that “official records,” those that are “regulated by statute to keep and maintain,” would “be open to inspection and copying” by the “citizens of this State having a personal or legal interest” in them, as well by “representatives of newspapers published in this State,” and “representatives of radio and television stations located in this State.” 1968 Va. Acts 691. In 1974, the requirement that the requester have “a personal or legal interest” was stricken, 1974 Va. Acts 514; however, at no time has this right of access extended to nonresidents, other than those specified. In its present form, the VFOIA provides, in pertinent part, that

[e]xcept as otherwise specifically provided by law, all public records shall be open to inspection and copying by *any citizens of the Commonwealth* during the regular office hours of the custodian of such records. Access to such records shall not be denied to citizens of the Commonwealth, representatives of newspapers and magazines with circulation in the Commonwealth, and representatives of radio and television stations broadcasting in or into the Commonwealth.

Va. Code Ann. § 2.2-3704(A) (emphasis added). The Virginia law authorizes “[a] public body” to impose only “reasonable charges not to exceed its actual cost incurred in accessing, duplicating, supplying, or searching for the requested records,” and prohibits such bodies from “impos[ing] any extraneous, intermediary or surplus fees or expenses to recoup the general costs associated with creating or maintaining records or transacting the general business of the public body.” Va. Code Ann. § 2.2-3704(F). Accordingly, a significant portion of the costs associated with provision of public records is borne by the taxpayers of the Commonwealth, not by the requesters of public records.

Petitioners have each sought certain Virginia “public records,” Va. Code Ann. § 2.2-3701, that they deem useful to their personal interests. In the case of McBurney, a resident of Rhode Island, he mailed two written requests to Virginia’s Division of Child Support Enforcement (DCSE), seeking documents relevant to his claim for child support payments. (4th

Cir. J.A. No. 11-1099, at 9a, 11a, 33a, 41a.) On April 8, 2008, McBurney requested “‘all emails, notes, files, memos, reports, policies, [and] opinions’” in DCSE’s custody regarding him, his son, and his former wife and “‘all documents regarding his application for child support’” and how similar applications are handled. (*Id.* at 11a.) These requests were filed in response to DCSE’s alleged error in filing a petition for child support requested by McBurney that resulted in his not obtaining child support payments for nine months. (*Id.*) McBurney specifically pled that the requests were made to obtain documents to “help him resolve the issues surrounding his child support application.” (*Id.* at 11a; see 37a-38a) (“I wish to obtain these documents to find out more about the circumstances of DCSE’s handling of my child support application. I want to uncover the exact circumstances that resulted in DCSE failing to file my petition in the correct court until nine months after I filed my application with DCSE. I want to use this information to advocate for my interests and to see if there is any available avenue to get reimbursed for the nine months worth of child support I have been denied.”). McBurney resubmitted his request using a Virginia address. (*Id.* at 11a; 36a.) Although both requests were denied in part on the ground that McBurney is not a Virginia citizen, (*id.* at 36a, 42a, 45a), DCSE “did . . . inform McBurney that he could obtain the requested information” under another Virginia statute. (*Id.* at 11a, 36a-37a, 45a.) Ultimately, McBurney “obtained some, but not all, of the” requested information under that statute, “over



eighty requested documents.” (*Id.* at 104a; Pet. App. at 54a); *see also* (*id.* at 36a-37a).

Petitioner Hurlbert, a resident of California who has made a business of obtaining “real estate tax assessment records” for his clients “from state governmental agencies across the country” utilizing state FOIA laws, telephoned a request in June of 2008, seeking such records for all real estate parcels located in Henrico County, Virginia. (*Id.* at 12a, 46a-47a.) The Henrico County Real Estate Assessor’s Office denied the June 2008 request on the ground that he is not a citizen of the Commonwealth. (*Id.* at 12a, 47a.)

Petitioners filed suit under 42 U.S.C. § 1983 in the United States District Court for the Eastern District of Virginia, seeking declaratory and injunctive relief. (*Id.* at 3a, 8a.) The suit claimed that VFOIA’s “citizens-only provision” violates the Privileges and Immunities Clause by denying them “their right to participate in Virginia’s governmental and political processes” by barring them “from obtaining information from Virginia’s government.” (*Id.* at 15a-16a.) Petitioner Hurlbert also claimed that VFOIA violated the dormant Commerce Clause by excluding him, as a noncitizen, “from pursuing any business stemming from Virginia public records on substantially equal terms with Virginia citizens.” (*Id.* at 18a-19.)

After an initial appeal and remand, *McBurney v. Cuccinelli*, 616 F.3d 393, 404 (4th Cir. 2010), (*id.* at

5a), the parties filed cross-motions for summary judgment on the merits. (*Id.* at 102a.) The district court held that the record failed to identify any fundamental right protected by the Privileges and Immunities Clause that was abridged by VFOIA. *McBurney v. Cuccinelli*, 780 F. Supp. 2d 439, 451 (E.D. Va. 2011). Moreover, it concluded that the law was not a “[d]iscriminatory restriction[] on commerce” and did not otherwise violate the dormant Commerce Clause because, “[w]hile the law may have some incidental impact on out-of-state business, [its] goal is not to favor Virginia business over non-Virginia business.” *Id.* at 452-53.

A unanimous panel of the United States Court of Appeals for the Fourth Circuit agreed. *McBurney v. Young*, 667 F.3d 454, 470 (4th Cir. 2012). Applying this Court’s “two-step inquiry” for Privileges and Immunities claims, *id.* at 462 (citing *Supreme Court of Virginia v. Friedman*, 487 U.S. 59, 64 (1988)), the court of appeals “conclud[ed] that the [law] does not infringe on any of the Appellants’ fundamental rights or privileges protected by the Privileges and Immunities Clause.” *Id.* at 467. Consequently, the Fourth Circuit did not proceed to the second step of evaluating the state interest advanced by the citizens-only provision. *Id.* at 468. The court of appeals also rejected petitioner Hurlbert’s dormant Commerce Clause claim, concluding that the district court properly applied “[t]he second tier of dormant Commerce Clause analysis[,] the *Pike* test,” rather than the first tier, because the law “does not facially,

or in its effect, discriminate against interstate commerce or out-of-state economic interests,” but “is wholly silent as to commerce or economic interests, both in and out of Virginia.” *Id.* at 468-69 (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970)). The court also noted that Hurlbert had not appealed the district court’s resolution of this issue, and thus, had “waived any challenge to” “how the [district] court undertook the *Pike* analysis.” *Id.* at 469-70.

At the heart of the Fourth Circuit’s analysis of petitioners’ Privileges and Immunities claims was the holding that petitioners had failed to identify any protected privilege that was being infringed. In so holding, the court of appeals, following “the Supreme Court’s jurisprudence, recognized that states are permitted to distinguish between residents and nonresidents so long as those distinctions do not ‘hinder the formation, the purpose, or the development of a single Union of those States’” by abridging “‘privileges’ and ‘immunities’ bearing upon the vitality of the Nation as a single entity.” *Id.* at 462-63 (emphasis omitted) (quoting *Baldwin v. Fish & Game Comm’n of Montana*, 436 U.S. 371, 383 (1978)). The court observed that petitioners asserted a number of “rights,” but that only two of them arguably touched on fundamental rights as identified by this Court: “the right to access courts and the right to pursue a common calling.” *Id.* at 463. The former, asserted only by McBurney, *id.* at 463 n.3, was rejected because the right claimed “is something much different than any court access right previously

recognized,” because the law does not “speak[ ] to the [petitioners’] ability to file a proceeding in any court or otherwise enforce a legal right within Virginia” and the “Privileges and Immunities Clause is not a mechanism for pre-lawsuit discovery.” *Id.* at 467.

In rejecting petitioner Hurlbert’s Privileges and Immunities claim—that the law abridged his right to pursue a common calling in Virginia on “‘terms of substantial equality’” with Virginia residents—the Fourth Circuit again concluded that the law just does not regulate in any sense that implicates that right. *Id.* at 464-65. Nothing prohibits Hurlbert from a common calling. The court reasoned that the law “limits one method by which Hurlbert may carry out his business and thus has an ‘incidental effect’ on his common calling in Virginia,” but “does not implicate Hurlbert’s right to pursue a common calling.” *Id.* at 465.

The Fourth Circuit held that the other alleged privileges and immunities that petitioners jointly asserted, namely the right to “‘equal access to information’” along with their “‘ability to pursue their economic interests on equal footing,’” are not fundamental rights protected by the Privileges and Immunities Clause at all. *Id.* at 463, 465-67. As for the right to pursue their economic interests on equal footing, the Fourth Circuit explained that no case had identified such a “novel generic right,” and held that, insofar as this right is protected by the Privileges and Immunities Clause, it is protected under the common calling and access to courts principles, neither of

which were offended by the Virginia law. *Id.* at 467 (citation omitted).

The Fourth Circuit, in rejecting petitioners' "equal access to information claim," distinguished *Lee v. Minner*, 458 F.2d 194 (3d Cir. 2006), and observed that "the specific right that *Lee* identified is not one previously recognized by the Supreme Court, or any other court, as an activity within the scope of the Privileges and Immunities Clause." *McBurney*, 667 F.3d at 465. *Lee* only recognized this right of equal access to information for nonresidents seeking "to engage in the political process with regard to matters of both national political and economic importance," that is, access to information sought "to advance the interests of other citizens or the nation as a whole, or that is of political or economic importance." *Id.* (quoting *Lee*, 454 F.3d at 199). Because petitioners, on the other hand, sought "information of [only] *personal* import"—*McBurney* to determine whether he had a legal claim against a Virginia agency and Hurlbert to fulfill his private contract for hire—the court of appeals held their claims of entitlement to information were not within "*Lee's* rationale." *Id.* at 465-66. The Fourth Circuit also declined to read into the Privileges and Immunities Clause "a 'broad right of access to information'" that is "grounded in 'the First Amendment's guarantees of free speech and free press,'" reasoning that the two clauses protect different rights. *Id.* at 466 (citations omitted).



Finally, the Fourth Circuit rejected the additional right petitioner McBurney appended to the “right to equal access to information” claim—“his ‘[right] to advocate for his [political] interests and the interests of others similarly situated’”—for the same reasons identified for rejecting the equal access to information and equal access to courts claims and also because petitioner McBurney had pled that he was requesting information “on his own behalf” “to advance *his own* interests,” not those of others. *Id.* at 463, 466-67 (citation omitted). (App. at 14a, 21a-22a.)

Petitioners’ interesting history of title recordation in America is entirely beside the point. (Pet’rs Br. at 2-6.) As documents required by law to be kept by clerks of court, title documents are expressly exempted from the Virginia Freedom of Information Act, and may be made available to the public via remote access. Va. Code Ann. § 2.2-3703(A)(5); see Va. Code Ann. §§ 17.1-223(A) and (D); -234, and -294; see also *id.*, §§ 16.1-69.53 through -69.58. What petitioner Hurlbert sought were miscellaneous real estate tax assessment records from the Tax Assessor of Henrico County, Virginia. (Pet’rs Br. at 12-13.) Nor is petitioner McBurney’s claim a case about access to the records of a judicial or administrative proceeding, but rather an inquest into “general policy information . . . about how” the Virginia Division of Child Support Enforcement “handles cases like his.” (Pet’rs Br. at 13-14.) Inasmuch as McBurney acknowledged that he received “some documents about his case under a different statute,” (*id.* at 14), and given the fact that

the agency provides guidance of this sort on its website. Virginia Dep't of Social Servs., Child Support, <http://www.dss.virginia.gov/family/dcse/>. The issue actually presented in this case is whether a recently invented, nontraditional state governmental service designed to further the exercise of state political rights must be accorded on an equal basis to noncitizens of that State under either the Privileges and Immunities Clause or the dormant Commerce Clause.

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### SUMMARY OF THE ARGUMENT

The petitioners urge this Court to adopt the ahistorical position that the Privileges and Immunities Clause of Article IV, Section 2 guarantees noncitizens equal claim to statutory rights of recent vintage crafted to enhance political participation in a State's polity. Neither the logic of the provision, the common law at the time of the Founding, nor this Court's precedents provide any support for the conclusion that statutory FOIA rights are "fundamental" for purposes of that constitutional provision. To hold that they are would not only throw into doubt a wide range of state and local governmental services, but also would run counter to basic constitutional fact: "this is a Nation composed of individual States." *Baldwin*, 436 U.S. at 383. Because none of the fundamental rights recognized by this Court as Article IV privileges or immunities are implicated by petitioners' claims, and, in any case, the

Commonwealth has a substantial interest in reserving her governmental services to those who are a member of the Commonwealth's political community and who finance their provision, petitioners' Privileges and Immunities claim should fail.

With regard to petitioners' dormant Commerce Clause claim, Virginia's citizenship limitation on FOIA rights does not facially discriminate against interstate commerce as such, but regulates the provision of a state service that furthers political participation. Petitioners' effects argument based on *Pike*, 397 U.S. 137, are both procedurally defaulted and irrelevant in view of this Court's governmental function cases. *See Davis*, 553 U.S. at 353-56, 359-61. In sum, the differential treatment accorded the noncitizen petitioners merely "reflect[s] the essential and patently unobjectionable purpose of state government—to serve the citizens of the State," and thus does not run afoul of either the Privileges and Immunities Clause or dormant Commerce Clause jurisprudence. *Reeves v. Stake*, 447 U.S. 429, 442 (1980).

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## ARGUMENT

### I. THE CITIZENSHIP LIMITATION ON THE DUTY OF VIRGINIA PUBLIC OFFICERS TO RESPOND TO PUBLIC RECORDS REQUESTS DOES NOT VIOLATE THE PRIVILEGES AND IMMUNITIES CLAUSE OF ARTICLE IV.

#### A. The Privileges and Immunities Clause Was Designed to Remove the Disabilities of Alienage and to Protect a Limited Class of Long-Held "Fundamental" Rights.

Upon declaring independence from Britain, Virginia became a sovereign entity, *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991), with the "Full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do." *Declaration of Independence* (capitalization original). Indeed, the Articles of Confederation confirmed that Virginia retained "its sovereignty, freedom, and independence, which is not by this confederation, expressly delegated to the United States, in Congress assembled." *Articles of Confederation* art. II. In other words, Virginia, and the other former colonies, became independent states like Great Britain and France except to the extent they expressly ceded sovereignty to Congress. This created a potential problem for the new nation. At common law, foreign citizens were subject to "the disabilities of alienage." *Baldwin*, 436 U.S. at 380-81

& n.19 (quoting *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1869)).

As Blackstone noted, an alien was not permitted to purchase, convey, or hold real property for his own use, nor was he able to inherit or transmit by inheritance such property; aliens were subject to special commercial taxes; and they were at times forbidden from working in certain trades. 2 William Blackstone, *Blackstone's Commentaries on the Laws of England* 371-74 (photo. reprint 1969) (St. George Tucker ed., Phil., Birch & Small 1803). Such restrictions, of course, are destructive of commerce and undermine the process of forging a single union out of a disparate group of States. See *The Federalist* No. 22, at 137 (Alexander Hamilton) (Jacob E. Cooke, ed., 1961) ("The interfering and unneighbourly regulations of some States contrary to the true spirit of the Union, have in different instances given just cause of umbrage and complaint to others; and it is to be feared that examples of this nature, if not restrained by a national control, would be multiplied and extended till they became not less serious sources of animosity and discord, than injurious impediments to the intercourse between the different parts of the confederacy.").

To address this problem, Article IV of the Articles of Confederation provided:

The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this union, the free



inhabitants of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions as the inhabitants thereof respectively, provided that such restrictions shall not extend so far as to prevent the removal of property imported into any State, to any other State, of which the owner is an inhabitant; provided also that no imposition, duties or restriction shall be laid by any State, on the property of the United States, or either of them.

*Articles of Confederation* art. IV, § 1. When the Articles of Confederation were replaced with our present constitution, the framers retained a similar provision, which provides that the "Citizens of Each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const. art. IV, § 2.

In the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 75 (1873), this Court observed: "There can be but little question that the purpose of both these provisions is the same, and that the privileges and immunities intended are the same in each." The Court explained that common purpose in 1948 in these words:

The primary purpose of this clause, like the clauses between which it is located—those relating to full faith and credit and to interstate extradition of fugitives from justice—was to help fuse into one Nation a collection of independent, sovereign States. It was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy. For protection of such equality the citizen of State A was not to be restricted to the uncertain remedies afforded by diplomatic processes and official retaliation.

*Toomer v. Witsell*, 334 U.S. 385, 395 (1948). Petitioners seek to erect a perfect universal rule of nondiscrimination based upon *Toomer*. (Pet'rs Br. at 19-20; 35.) But that is not what the later and recent cases say.

"It has not been suggested, however, that state citizenship or residency may never be used by a State to distinguish among persons."<sup>1</sup> *Baldwin*, 436 U.S. at 383. "Nor must a State always apply all its laws or all its services equally to anyone, resident or nonresident, who may request it so to do." *Id.* Only those activities "sufficiently basic to the livelihood of

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<sup>1</sup> "[T]he terms 'citizen' and 'resident' are 'essentially interchangeable' for purposes of analysis of most cases under the Privileges and Immunities Clause." *United Bldg. & Const. Trades Council v. City of Camden*, 465 U.S. 208, 216 (1984) (quoting *Austin v. New Hampshire*, 420 U.S. 656, 662 n.8 (1975)).

the Nation" are protected by the Clause. *Id.* at 388; see also *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 279-82 (1985) (explaining that the Privileges and Immunities Clause only applies to those rights which are "fundamental."). Other "distinctions between residents and non-residents merely reflect the fact that this is a Nation composed of individual States." *Baldwin*, 436 U.S. at 383. In other words, the scope of the Privileges and Immunities Clause is not absolute; it does not require each State to treat its own citizens and out-of-state citizens identically in every respect. Furthermore, "if the challenged restriction deprives nonresidents of a protected privilege," the restriction is invalidated only if it "is not closely related to the advancement of a substantial state interest." *Friedman*, 487 U.S. at 65.

What, then, is a fundamental right for purposes of the Clause? In *Ward v. Maryland*, 79 U.S. (12 Wall.) 418, 430 (1871), the Court concluded that the Privileges and Immunities Clause

secures and protects the right of a citizen of one State to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade, or business without molestation; to acquire personal property; to take and hold real estate; to maintain actions in the courts of the State; and to be exempt from any higher taxes or excises than are imposed by the State upon its own citizens.

The subsequent decisions of the Court adhere to this outline. This Court has concluded that practicing a trade or profession in a sister State is a fundamental privilege that is protected by the Clause. See *Toomer*, 334 U.S. at 403 (nonresident fishermen could not be required to shrimp in South Carolina on terms much more onerous than South Carolinians); *Hicklin v. Orbeck*, 437 U.S. 518, 533-34 (1978) (striking a hiring preference for residents of Alaska). Access to the courts also constitutes such a fundamental privilege, *Canadian Northern Railway Company v. Eggen*, 252 U.S. 553, 560-63 (1920), as do the ownership and disposition of privately held property within a State, *Blake v. McClung*, 172 U.S. 239, 252-53 (1898), and obtaining access to medical services available within the territory of a State, *Doe v. Bolton*, 410 U.S. 179, 200 (1973).

In contrast, big-game recreational hunting is not a fundamental privilege within the intendment of the Clause. *Baldwin*, 436 U.S. at 388. Therefore, a State may favor its own residents in that setting. *Id.* Public employment is not a fundamental privilege for purposes of the Clause. *Salem Blue Collar Workers Ass'n v. City of Salem*, 33 F.3d 265, 270 (3d Cir. 1994), *cert. denied*, 513 U.S. 1152 (1995). A city also may favor its own residents for handicapped parking permits, because such permits do not implicate a privilege that is "basic to the livelihood of the Nation." *Lai v. City of New York*, 991 F. Supp. 362, 365 (S.D.N.Y. 1998), *aff'd*, 163 F.3d 729, 730 (2d Cir. 1998).

Hence, the threshold Privileges and Immunities Clause question before the Court is whether a statutorily created right to an at or below cost search of government records is a fundamental privilege for purposes of the Clause. Va. Code Ann. § 2.2-3704(E) ("Failure to respond to a request for records shall be deemed a denial of the request and shall constitute a violation of this chapter"); Va. Code Ann. § 2.2-3704(F) ("A public body may make reasonable charges not to exceed its actual cost incurred in accessing, duplicating, supplying, or searching for the requested records. No public body shall impose any extraneous, intermediary or surplus fees or expenses to recoup the general costs associated with creating or maintaining records or transacting the general business of the public body.").

**B. Neither History nor Precedent Supports the Notion that Statutorily Created FOIA Rights Are Fundamental Under the Privileges and Immunities Clause.**

**1. FOIA is a modern statutory creation, not a foundationally important fundamental right (Pet'rs Br. at 34-46).**

FOIA statutes are of relatively recent origin. Virginia did not enact its freedom of information act until 1968. *See* 1968 Va. Acts 690. Similarly, the federal government did not pass a freedom of information act until 1966. *See* Freedom of Information Act, Pub. L. No. 89-554, § 1, 80 Stat. 378, 383 (Sept. 6, 1966). The recent vintage of these



statutes undermines the notion that they are so “basic to the livelihood of the Nation” that they should trigger the protections of the Clause. *Baldwin*, 436 U.S. at 388. As a consequence, Petitioners find it vitally important to mischaracterize the law as an economic enactment or regulation in an attempt to bolster Hulbert’s common calling claim. (Pet’rs Br. at 19-24.)

Virginia’s FOIA statute contains a declaration of purpose and policy. Va. Code Ann. § 2.2-3700(B) (entitled “Short title; policy”). The purpose of the law is political, not economic; it is a species of sunshine law intended to increase transparency in the political process. As such, its benefits are logically and properly bestowed on those directly affected by that political process—i.e., citizens—and on media with a Virginia presence. This provides a substantial reason for Virginia’s unwillingness to assume the burden of responding to FOIA requests from noncitizens with no direct stake in Virginia politics and governance. See *Sáenz v. Roe*, 526 U.S. 489, 502 (1999) (discussing substantial reasons).

**2. Contrary to Hurlbert’s argument, Virginia has not violated his right to ply his trade, practice his occupation, or pursue a common calling (Pet’rs Br. at 35-39).**

Hurlbert’s reliance on common calling jurisprudence is misplaced. What he advances is the broadest grammatically possible scope for common

calling jurisprudence: a rule that no state benefit can be withheld from a nonresident if it has a remote or incidental effect on whatever business model that nonresident chooses to adopt. None of his Privileges and Immunities Clause cases go so far or support the rule he advocates. (Pet'rs Br. at 35-36.) Those cases instead involve either an outright ban on nonresidents performing work or involve the imposition of discriminatory taxes and fees on work performed in state by nonresidents.<sup>2</sup> Distinctions drawn between residents and nonresidents which have the potential to indirectly disadvantage a business have been upheld as a matter of course where the right or privilege at issue is not fundamental. See, e.g., *Zobel v. Williams*, 457 U.S. 55 (1982) (natural resources royalty payments to residents); *Chemung Canal Bank v. Lowery*, 93 U.S. 72 (1876) (tolling statute of limitations); *In re Merrill Lynch Relocation Mgmt., Inc.*, 812 F.2d 1116 (9th Cir. 1987) (nonresident cost bond); *Brewster v. N. Am. Van Lines, Inc.*, 461 F.2d 649 (7th Cir. 1972) (same); *O'Brien v. Wyoming*, 711 P.2d 114 (Wyo. 1986) (sports and recreation not fundamental); *Bode v. Flynn*, 252 N.W. 284 (Wis. 1934) (statute of limitations).

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<sup>2</sup> *Hillside Dairy, Inc. v. Lyons*, 539 U.S. 59 (2003), did not address the merits on the Privileges and Immunities claim. *Id.* at 64, 67. (Pet'rs Br. at 38.) The cases of *Lunding v. N.Y. Tax Appeals Tribunal*, 522 U.S. 287, 302-03 (1998), *Austin*, 420 U.S. at 659, and *Chalker v. Birmingham & Northwestern Railway Co.*, 249 U.S. 522, 525-26 (1919), all involved discriminatory taxation of nonresident businesses or workers. (Pet'rs Br. at 38.)

As demonstrated immediately below, Virginia does not prohibit Hurlbert's business in Virginia. Nor does it impose unequal taxes or fees. It simply declines to ply Hurlbert's trade for him under a statute that does not regulate a fundamental right.<sup>3</sup>

### **3. Hurlbert's property argument is misplaced (Pet'rs Br. 39-42).**

While it is true that the ability to transfer title is a fundamental right under the Privileges and Immunities Clause, *Baldwin*, 436 U.S. at 387; *Paul*, 75 U.S. (8 Wall.) at 180, VFOIA has nothing to do with title records. Those "records required by law to be maintained by the clerks of the courts" are exempt from VFOIA. Va. Code Ann. § 2.2-3703(A)(5); Va. Code Ann. §§ 17.1-223(A) and -227 through -254 (circuit court clerks); *see also* Va. Code Ann. § 17.1-200 and -204 (Supreme Court of Virginia); *id.*, §§ 16.1-69.40 and 16.1-69.53 through -69.58 (district courts). Furthermore, those documents, including title documents, Va. Code Ann. § 55-106, judgment liens, *id.*, § 8.01-446, -477, tax liens, *id.*, § 55-142.1, 58.1-314, 58.1-908(A)(2), 58.1-1805(A), 58.1-2021(A), 58.1-3172, and financing statements, *id.*, § 8.9A-501(a)(1), are "open to inspection" and copying by "any person." Va. Code Ann. § 17.1-208; *see* Va. Code Ann.

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<sup>3</sup> The arguments of amici attempting to challenge VFOIA as violative of other common callings, *see* Amicus Br. of ACLU at 6-12; Br. Amici Curiae of Reporters Comm. at 25-32, are not before the Court.

§ 17.1-225 and -226 (remote inspection of circuit court records). So Hurlbert's arguments, found at pages 39-42 of Petitioners' Brief under the heading "Property," are quite beside the point.

**4. McBurney's "public proceedings" argument is incoherent (Pet'rs Br. 42-44).**

As the district court correctly ruled, "McBurney's right to access courts is not implicated in this case." *McBurney*, 780 F. Supp. 2d at 449. (4th Cir. J.A. at 114a.) And access to an administrative agency is not implicated by analogy either. McBurney had full access to the agency which acted on his behalf at his request. What he is complaining about is that the agency allegedly partially bungled the job when he asked for its help. When he requested documents under FOIA, the Department of Social Services refused, suggesting that he seek them "pursuant to the Government Data Collection and Dissemination Practices Act." (4th Cir. J.A. at 45a.) When "McBurney submitted a request under this Act," he "obtained some, but not all, of the documents he would have received under" FOIA. McBurney also sought documents concerning practices and procedures of the agency, although the record does not disclose what else, if anything, was available but not on the agency website. Virginia Dep't of Social Servs., Child Support, <http://www.dss.virginia.gov/family/dcse/>. On this record it cannot be found that McBurney was denied access to any agency

proceeding. What he was denied was some undefined portion of the presuit discovery which he wanted the government to perform on his behalf, but such assistance has never been thought to be a fundamental right protected by the Privileges and Immunities Clause.

**5. An equal right of access to all governmental information has never been deemed fundamental for Privileges and Immunities purposes (Pet'rs Br. at 44-46).**

The recognized privileges and immunities are few and defined and resemble each other in kind. Article IV's protection of Privileges and Immunities has its source in Article IV of the Articles of Confederation. *Baldwin*, 436 U.S. at 379-80 & n.17. The Articles provided an illustrative list of Privileges and Immunities in these terms:

the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively, provided that such restrictions shall not extend so far as to prevent the removal of property imported into any State, to any other State, of which the owner is an inhabitant; provided also that no imposition, duties or restrictions shall be laid by any



State, on the property of the United States,  
or either of them.

*Articles of Confederation* art. IV, cl. 1. Although the illustrative list was omitted from the Constitution, U.S. Const. art. IV, § 2, cl. 1; see *The Federalist* No. 42, at 25 (James Madison) (Jacob E. Cooke, ed., 1961) (“[W]hat was meant by super-adding ‘to all privileges and immunities of free citizens’—‘all the privileges of trade and commerce,’ cannot easily be determined.”), the agreed purpose of this provision was to remove from nonresidents “the disabilities of alienage,” *Baldwin*, 436 U.S. at 380-81 & n.19, a set of legal restrictions known to the common law and imposed upon foreign citizens by virtue of their foreign status. 2 William Blackstone, *Blackstone’s Commentaries on the Laws of England* 371-74 (photo. reprint 1969) (St. George Tucker ed., Phil., Birch & Small 1803) (listing prohibitions on ownership of real property, inheriting or transmitting an inheritance, working in certain trades and the imposition of special commercial taxes). The first federal case construing the rights protected by the Privileges and Immunities Clause, *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1825) (Case No. 3,230), described the rights protected as being “confined” to “those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign.” *Id.* at 551-52.

Thus, the provision does not require a state "to extend to the citizens of all the other states the same advantages as are secured to their own citizens" especially with regard to "regulating the use of the common property of the citizens of such state." *Id.* at 552.

Justice Washington in *Corfield* also provided an illustrative list. That list included the "right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal." *Id.*; see also *Ward*, 79 U.S. (12 Wall.) at 430 (providing a similar listing of rights).

Lack of access to public records upon request was not a disability of alienage under the common law, nor has the right of such access, "at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign," as neither the states nor the federal government provided citizens general assistance in obtaining access to non-judicial public records, upon mere request without a showing of standing or private right, until the last third of the twentieth century. *Id.*; see 5 U.S.C. § 552; The Freedom of Information Act, Pub. L. No. 89-554, § 1, 80 Stat. 378, 383 (Sept. 6, 1966); cf. David C. Vladeck, *Access and Dissemination of Information: Information Access—Surveying the Current Legal Landscape of*

*Federal Right-to-Know Laws*, 86 Tex. L. Rev. 1787, 1795-96 (2008) (describing the federal government's enactment of its own freedom of information laws in 1966 as "truly an experiment in open government" and noting that, "[a]t the time of its passage, only two countries—Sweden and Finland—had open record laws resembling" the federal FOIA). Recognition of an Article IV privilege to demand the assembly of public records by state officials would require the Court to take leave of any historical understanding of what counts as "fundamental" for purposes of the Privileges and Immunities Clause.

For, outside of land title records and judicial records, public access to official records depended at the time of the Founding upon a showing of private right and interest. Contrary to the contentions of petitioners and certain of their amici,<sup>4</sup> neither English nor American common law at that time recognized a general right for all persons to access all public records, and thus the Privileges and Immunities Clause, incorporating the protections of Article IV of the Articles of Confederation, could not have rendered such a claimed right fundamental. Rather, English courts limited a requester's entitlement, even with respect to judicial records and land records, to persons with "a proprietary interest in the document or upon a need for it as evidence in a

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<sup>4</sup> See (Pet'rs. Br. at 45); (Amicus Br. of Public Justice, P.C. at 4-15); (Br. Amici Curiae, The Reporters Comm., et al. at 26-29); (Br. of Amici Curiae Judicial Watch, Inc., et al. at 5-9).

lawsuit." *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597-98 (1978). They generally rejected claims of a right to inspect non-judicial records altogether. See, e.g., *Rex v. Justices of Staffordshire*, 6 Ad. & E. 84, 101, 112 Eng. Rep. 33, 39 (K.B. 1837).

Many American courts followed this approach, see, e.g., *Burton v. Reynolds*, 68 N.W. 217 (Mich. 1896) (refusing access to records of court proceeding affecting title sought by title abstractor); *Cormack v. Wolcott*, 15 P. 245, 246 (Kan. 1887) (same), while making a distinction between judicial records, which are not at issue here, and public records. See *Tennessee ex rel. Welford v. Williams*, 75 S.W. 948, 956 (Tenn. 1903). The rights of public access were viewed in these terms:

It is not the unqualified right of every citizen to demand access to, and inspection of the books or documents of a public office, though they are the property of the public, and preserved for public uses and purposes. The right is subject to the same limitations and restrictions, as is the right to an inspection of the books of a corporation, which strangers can not claim, and which is allowed only to the corporators, when a necessity for it is shown, and the purpose does not appear to be improper.

*Brewer v. Watson*, 71 Ala. 299, 305 (Ala. 1882) (noting that "the individual who claims access to public records and documents (not judicial records, of which, by statute and unvarying usage, the custodian, upon

the payment of the fee allowed by law, is bound to furnish copies), can properly be required to show that he has an interest in the document which is sought, and that the inspection is for a legitimate purpose." (citations omitted)). It is true that some American courts, breaking with the English common law, came to view the status of a citizen/taxpayer to be enough, recognizing an interest in the management of the public fisc. *Compare Welford*, 75 S.W. at 954-55 (affirming taxpayer access to the fiscal records of a municipal corporation), *with Justices of Staffordshire*, 6 Ad. & E. at 96, 101, 103, 112 Eng. Rep. at 37, 39-40 (rejecting the claim that "rate-payers of any . . . county have, as such, any right to inspect and copy the bill of charges of county officers" that "have been deposited by the clerk of the peace among the county records," reasoning that "no slight inconvenience might result from holding that, in every county, all its thousands of rate-payers, with no interest, and without fee or reward, have a right to the inspection now contended for").

It is also true that some American courts broke entirely from the English common law, appearing to adopt the rule that nearly all judicial and non-judicial records were available to anyone, whether they had a private legal interest in them or not.<sup>5</sup> See *City of*

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<sup>5</sup> However, as illustrated by closer inspection of the Virginia case relied upon by petitioners and amici, *Clay v. Ballard*, 87 Va. 787, 13 S.E. 262 (1891), many cases cited as applying a common law right of public access to non-judicial records often depended

(Continued on following page)



*St. Matthews v. Voice of St. Matthews, Inc.*, 519 S.W.2d 811, 814-15 (Ky. 1974) (concluding that “the necessity of showing an interest such as would enable a person to maintain or defend a lawsuit as a prerequisite to his right to inspect a public record to be an unwarranted impediment to the right of people generally to acquire information concerning the operation of their government” and holding that a newspaper was entitled to “all records maintained by a state, county or municipal government as evidence of the manner in which the business of that unit of government has been conducted” because “public records” sought for a “wholesome public interest”); *Burton v. Tuite*, 44 N.W. 282 (Mich. 1889) (recognizing a title abstractor’s right to inspect records of tax levies by a city on real property).

It bears noting as well that cases relied upon by amici to claim that VFOIA violates the Privileges and Immunities Clause because it supposedly runs counter to a common law right, (Br. Amici Curiae Public Justice at 11; Br. of Amici Curiae Judicial

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upon a statutory right, see *Burton v. Tuite*, 44 N.W. 282 (Mich. 1889), and continued to require some cognizable interest. See *Clay*, 87 Va. at 787, 790, 794, 13 S.E. at 262-263, 265 (recognizing “that any person having an interest” in voter registration books “would have a right to inspect them” “upon general principles,” citing former Va. Code § 84 as giving the right of public inspection, explaining that “[t]he case turns upon the construction of this statute,” and concluding that a “legally qualified voter” in the election district that the registration books covered was entitled under the statute to inspect, and copy, those books).

Watch at 7-8), deemed citizenship limitations to be appropriate. See, e.g., *Nowack v. Fuller*, 219 N.W. 749, 749, 751 (Mich. 1928) (holding that the plaintiff, “as a citizen and taxpayer has a common-law right to inspect the public records in the auditor general’s office, to determine if the public money is being properly expended [by the Governor of Michigan]. It is a right that belongs to his citizenship.”). Thus, to the extent that “the right to inspect public documents . . . is well defined and understood,” (Br. of Amici Curiae Judicial Watch at 6) (quoting *Clay*, 87 Va. at 791, 13 S.E. at 263), it was often *not* defined as petitioners and their amici understand it.<sup>6</sup> A review of the common law compels two conclusions. First, rights of public access were not sufficiently uniform or generous to give rise to any equal right of access which could be deemed fundamental for purposes of the Privileges and Immunities Clause. Second, Hurlbert’s unlimited right of access to Virginia real estate records maintained by the clerks of the circuit courts despite being a noncitizen and nontaxpayer, see Va. Code Ann. § 17.1-208, and McBurney’s right of access under Virginia’s Government Data Collection and Dissemination Practices Act, Va. Code Ann.

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<sup>6</sup> Amicus Public Justice claims that under the common law a requester “did not have to be a citizen” “if the requester had a business, litigation, or property interest,” but offers no support for that claim, citing two cases that cite the requester’s citizenship and taxpayer status to support his claim of right. See *Nowak*, 219 N.W. at 751; *Indiana ex rel. Colescott v. King*, 57 N.E. 535, 537 (Ind. 1900).

§§ 2.2-3800 through -3809, to all information and data concerning him or his case, are probably broader than any right of access to public documents recognized at common law anywhere in America at the time of the Founding.

**6. States have a substantial interest in limiting their provision of services that do not involve fundamental rights to their own citizens (Pet'rs Br. at 47-54).**

Petitioners advance the proposition that any distinction based upon residence is invalid unless "the state can show that non-citizens 'constitute a peculiar source of the evil at which the statute is aimed.'" (Pet'rs Br. at 47) (quoting *Toomer*, 334 U.S. at 398). And they appear to argue this whether or not a right deemed fundamental is involved. (Pet'rs Br. at 47-49). But States have an undoubted authority to direct services of a legislatively discretionary character not involving fundamental rights to their citizens as a function of their power to define and serve their political communities. See *Cabell v. Chavez-Salido*, 454 U.S. 432, 438-39 (1982) (noting that this "Court has confronted claims distinguishing between the economic and sovereign functions of government," and that "[t]his distinction has been supported by the argument that although citizenship is not a relevant ground for the distribution of economic benefits, it is a relevant ground for determining membership in the political

community"). Likewise, practices and procedures directed to the performance of state governmental functions may distinguish between citizens and noncitizens.

Despite acknowledging a shifting of the theoretical foundation for evaluating whether a claimed right was in fact a privilege or immunity, *Baldwin*, 436 U.S. at 381-83, this Court's precedents have consistently hewed to the view that, in some circumstances, "state citizenship or residency may . . . be used by a State to distinguish among persons." *Id.* at 383. "Some distinctions between residents and nonresidents merely reflect the fact that this is a Nation composed of individual States, and are permitted; other distinctions are prohibited because they hinder the formation, the purpose, or the development of a single Union of those States." *Id.*; see *Paul*, 75 U.S. (8 Wall.) at 180 ("Special privileges enjoyed by citizens in their own States are not secured in other States by this provision."). The Court has also consistently maintained that not just any benefit is a privilege or immunity, but that "[o]nly with respect to those 'privileges' and 'immunities' bearing upon the vitality of the Nation as a single entity," or that are "basic to the maintenance or well-being of the Union," or "the livelihood of the Nation," "must the State treat all [U.S.] citizens, resident and nonresident, equally." *Baldwin*, 436 U.S. at 383, 388; see *Corfield*, 6 F. Cas. at 552 (opining that the protected rights were limited to "those privileges and immunities which are, in their nature,

fundamental"). And the protected activities have notably been commercial in nature, as "the Privileges and Immunities Clause was intended to create a national economic union." *Piper*, 470 U.S. at 279-80.

Accordingly, this Court has never held that a State's restriction on noncitizens' political rights violated the Privileges and Immunities Clause. *Baldwin*, 436 U.S. at 383 (citing, inter alia, *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972) (citizens-only voting) and *Kanapaux v. Ellisor*, 419 U.S. 891 (1974) (citizens-only elected officials)). Nor has it held that any of the "personal" rights enumerated in the first Eight Amendments were protected by the Privileges and Immunities Clause.<sup>7</sup> See *McBurney*, 667 F.3d at 462; 2 Donald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law* § 12.7, at 335 (4th ed. 2007) ("[W]hether a right is sufficiently fundamental to be protected by the [Privileges and Immunities] clause should not be confused with a determination of whether an activity constitutes a fundamental right so as to require strict judicial scrutiny under the due process and equal protection clauses."). And even if the Privileges and Immunities Clause were thought to selectively incorporate protection for political advocacy, it would be incongruous to hold that the Privileges and Immunities Clause protects a noncitizen's right to obtain information from state

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<sup>7</sup> Thus the contention of amici ACLU that "political advocacy" is an Article IV privilege or immunity lacks any support. See (Br. Amicus Curiae ACLU at 14-17.)



government on equal footing as citizens when the First Amendment does not guarantee that right to anyone, even members of the press.<sup>8</sup> See *Houchins v. KQED, Inc.*, 438 U.S. 1, 14 (1978) (plurality opinion) (“There is no constitutional right to have access to particular government information, or to require openness from the bureaucracy. . . . The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act.” (quoting Potter Stewart, *Or of the Press*, 26 Hastings L. J. 631, 636 (1975))).

Even where a recognized right has been burdened by non-provision of some state government service, this Court has accepted those restrictions provided the right itself is not destroyed. For a State need not “always apply all its laws or all its services equally to anyone, resident or nonresident, who may request it so to do.” *Baldwin*, 436 U.S. at 383 (citing, e.g., *Eggen*, 252 U.S. at 560-62); see also *Martinez v. Bynum*, 461 U.S. 321, 328 (1983) (holding that “[a] bona fide residence requirement . . . furthers the substantial state interest in assuring that services provided for its residents are enjoyed only by residents,” and thus, local public schools need not offer the same tuition rates to nonresident students as resident students); *Starns v. Malkerson*, 401 U.S.

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<sup>8</sup> What is more, neither of the petitioners were seeking the documents to engage in political advocacy. On the same principle, amici’s contention that VFOIA violates the rights of the press are both not presented in this case and meritless if they were. See (Br. Amici Curiae Reporters Comm.).

985 (1971) (summarily affirming bona fide residence requirement for in-state tuition rate at state university).

Recurring to this Court's precedents regarding the Privileges and Immunities Clause's protections, it is apparent that the Fourth Circuit faithfully applied settled law. For there is no protected "privilege" to every means by which a citizen of a state may "secur[e] any number of personal, economic, and political interests." (Pet. at 15.) Rather, the recognized privileges and immunities are few and defined: "the right to travel interstate," *Shapiro v. Thompson*, 394 U.S. 618, 629-30 & n.8 (1969); to pursue "common callings within the State" free from "unreasonable burdens" not borne by residents; to "own[ ] and dispos[e] of privately held property within the State"; to "access . . . the courts of the State," *Baldwin*, 436 U.S. at 383; and to procure on substantially equal terms "the general medical care available within [a State]." *Bolton*, 410 U.S. at 200. While these rights may prove useful in "securing any number of personal, economic, and political interests," it does not follow, nor has it ever been previously suggested, that any means provided by a State to aid its citizens in the pursuit of those interests must be afforded to noncitizens. And even where the protected privilege is plainly restricted, the restriction will be invalidated only if it "is not closely related to the advancement of a substantial state interest," *Friedman*, 487 U.S. at 65, a question

neither the district court nor court of appeals had occasion to reach.

The traditional state practice of distinguishing between citizens and noncitizens in the provision of services not involving fundamental rights—and making such distinction in laws intended to govern the political functioning of the state—itself provides substantial reasons for the distinction made here. The VFOIA citizenship limitation precisely serves that interest. As a consequence, the complaint of petitioners that Virginia has failed to quantify the administrative burden of providing services to noncitizens is of no moment. (Pet'rs Br. at 49-53.) Similarly, Virginia has no burden to demonstrate a substantial relationship between ends and means. (Pet'rs Br. at 53-54). Both the district court and the Fourth Circuit followed existing law by treating the nonexistence of a fundamental right as the threshold and potentially dispositive question. *McBurney*, 667 F.3d at 467-68; *McBurney*, 780 F. Supp. 2d at 451. If those courts erred in finding that the selective provision by Virginia of the non-fundamental privilege of making FOIA requests does not violate the Privileges and Immunities Clause, nothing in existing doctrine clearly foreshadows or explains that result.

## II. THE VIRGINIA FREEDOM OF INFORMATION ACT DOES NOT VIOLATE THE DORMANT COMMERCE CLAUSE (Pet'rs Br. at 24-34).

The Fourth Circuit correctly held that first-tier dormant Commerce Clause analysis is not triggered by contingent, remote or incidental effects on commerce. *McBurney*, 667 F.3d at 469 (“Any effect on commerce is incidental and unrelated to the actual language of VFOIA or its citizens-only provision.”). First-tier analysis is instead triggered “‘where a state law discriminates facially, in its practical effect, or in its purpose’ against interstate commerce.” *Id.* at 468 (quoting *Env'tl. Tech. Council v. Sierra Club*, 98 F.3d 774, 785 (4th Cir. 1996)); cf. *Kentucky Dep't of Revenue v. Davis*, 553 U.S. 328, 338 (2008). Under the active Commerce Clause, this Court has never extended the definition of commerce beyond “use of the channels of interstate commerce” and “the instrumentalities of interstate commerce, or persons and things in interstate commerce.” *United States v. Lopez*, 514 U.S. 549, 558 (1995). It is true that the Court sustains exercises of Congressional regulatory power in active Commerce Clause cases over “activities that substantially affect interstate commerce,” *id.* at 559, but that is an application of the Necessary and Proper clause. *Katzenbach v. McClung*, 379 U.S. 294, 301-02 (1964); *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942); see *Gonzales v. Raich*, 545 U.S. 1, 34 (2006) (Scalia, J., concurring in the judgment) (“Congress’s regulatory

authority over intrastate activities that are not themselves part of interstate commerce (including activities that have a substantial effect on interstate commerce) derives from the Necessary and Proper Clause.”). There is also an effects component for dormant Commerce Clause analysis, but that is the second-tier analysis provided under *Pike*. Unfortunately for Hurlbert, the Fourth Circuit found that any *Pike* challenge had been procedurally defaulted for want of briefing.<sup>9</sup> *McBurney*, 667 F.3d at 469-70 (citing Fed. R. App. R. 28(a)(9)(A)). And, of course, Hurlbert’s scant earnings (4th Cir. J.A. at 101a), and the thin evidence that similar companies exist, (*id.* at 65a), render unsustainable Hurlbert’s claim that the incidental effects of VFOIA on his business result in an unreasonable burden on interstate commerce.<sup>10</sup>

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<sup>9</sup> Although petitioners claim to have given “fair notice” of a *Pike* argument in their summary of the argument in their Fourth Circuit brief (Pet’rs Br. at 52-53 n.13), a fair reading of that argument discloses only a first-tier discrimination challenge. (*McBurney*, Case No. 11-1099, Doc. 15 at 22-23 of 61). Petitioners’ claim that “this Court has reached the *Pike* test in pure ‘facial challenge’ cases,” even if true in the sense that the Court has “purported to apply the undue burden test,” yet decided the question “in whole or in part on the discriminatory character of the challenged regulation,” *GMC v. Tracy*, 519 U.S. 278, 298 n.12 (1997), would not justify reaching it here, where the petitioners plainly failed to make out or preserve the *Pike* claim. (Pet’rs Br. at 53 n.13.)

<sup>10</sup> Though it is certainly true that purveyors of data request public records and employ themselves gainfully in their sale, petitioners and amici’s representations that VFOIA is

(Continued on following page)



Petitioners rely upon *Reno v. Condon*, 528 U.S. 141 (2000), for the proposition that state records are *per se* articles of commerce. (Pet'rs Br. at 26.) The actual holding in *Condon* was that Congress had the power to enact the Driver's Privacy Protection Act under the active Commerce Clause because States were engaged in traditional interstate commerce by selling certain records in the interstate market. *Condon*, 528 U.S. at 148-49, 151. Because Congress was regulating "a 'thin[g] in interstate commerce,'" the Court found it unnecessary to reach the Necessary and Proper Clause's substantial effects prong of Interstate Commerce Clause doctrine. *Id.* at 148-49.

In the present case, Virginia has not placed its documents "into the interstate stream of business." *Id.* at 148. Rather, in discharging a governmental, noncommercial function, it has made state records potentially available to certain requesters, its citizens, who might or might not put them in interstate commerce.<sup>11</sup> This means that if Congress sought to regulate those documents under the active Commerce Clause, the Court would have to reach the

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"disruptive of a national economic market in products and services depending on equal access to public record information," (Br. Amici Curiae of Coalition for Sensible Public Records Access at 22; Pet'rs Br. at 33-34) lack any factual support.

<sup>11</sup> That Virginia makes them available to media outlets as well, Va. Code Ann. § 2.2-3704(A), does not change the Commerce Clause analysis for the citizenship limitation.

effects prong. But of course, this is a dormant Commerce Clause case and effects are analyzed in that context under the procedurally defaulted *Pike* test. Not only that, but there is substantial doubt “whether *Pike* even applies to a case of this sort.” *Davis*, 553 U.S. 328, 353. Respondents submit that the *Pike* test should not apply for the reasons stated in Part IV of the *Davis* opinion, *id.* at 353-56, and in Justice Scalia’s concurrence. *Id.* at 359-61 (Scalia, J., concurring in part).

The fact that this case involves a governmental function, rather than commerce, carries with it other analytical consequences. First, where a State engages in “a government function,” its conduct “is not susceptible to standard dormant Commerce Clause scrutiny owing to its likely motivation by legitimate objectives distinct from the simple economic protectionism the Clause abhors.”<sup>12</sup> *Id.* at 341; *id.* at 357-59 (Stevens, J., concurring).

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<sup>12</sup> Amici’s objections to application of the governmental function doctrine—because Virginia “has a natural monopoly on its public records,” and, in creating the documents, is “perform[ing] a legislative function”—provide further support for excepting this uniquely governmental activity from dormant Commerce Clause scrutiny. *Cf. Davis*, 553 U.S. at 359-60 (Scalia, J., concurring in the judgment) (cautioning that “it would be no small leap from invalidating state discrimination in favor of private entities to invalidating state discrimination in favor of the State’s own subdivisions performing a traditional governmental function”). (Br. Amici Curiae Coalition for Sensible Public Records Access at 15-19.)

Second, fulfilling governmental functions is not “protectionist” within the contemplation of the dormant Commerce Clause, but only “in the sense that it limits benefits generated by a state program to those who fund the state treasury and whom the State was created to serve.” *Reeves*, 447 U.S. at 442 (“Petitioner’s argument apparently also would characterize as ‘protectionist’ rules restricting to state residents the enjoyment of state educational institutions, energy generated by a state-run plant, police and fire protection, and agricultural improvement and business development programs. Such policies, while perhaps ‘protectionist’ in a loose sense, reflect the essential and patently unobjectionable purpose of state government—to serve the citizens of the State.”).

Finally, because “any notion of discrimination” within the contemplation of the dormant Commerce Clause “assumes a comparison of substantially similar entities,” *General Motors Corp.*, 519 U.S. at 298, distinguishing between taxpayers and voters on the one hand and noncitizens on the other in the provision of a state service does not constitute discrimination in the necessary sense of that term.

As a consequence of all of this, the Fourth Circuit correctly held that the Virginia Freedom of Information Act “simply does not fall within the type of provision to which the first[-]tier test of analyzing dormant Commerce Clause claims applies,” *McBurney*, 667 F.3d at 469, and, with the *Pike* analysis

foreclosed, that petitioner Hurlbert's dormant Commerce Clause claim also fails. *Id.* at 470.

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## CONCLUSION

For the reasons stated above, the judgment of the Fourth Circuit should be **AFFIRMED**.

Respectfully submitted,

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January 24, 2013

# **REPLY**

# **BRIEF**



No. 12-17

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IN THE

**Supreme Court of the United States**

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MARK J. MCBURNEY and ROGER W. HURLBERT,  
*Petitioners,*

v.

NATHANIEL YOUNG, JR., Deputy Commissioner and  
Director, Division of Child Support Enforcement,  
Commonwealth of Virginia and THOMAS C. LITTLE,  
Director, Real Estate Assessment Division, Henrico  
County, Commonwealth of Virginia,  
*Respondents.*

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On Writ of Certiorari to the United States  
Court of Appeals for the Fourth Circuit

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**REPLY BRIEF FOR PETITIONERS**

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## REPLY BRIEF FOR PETITIONERS

States may not enforce policies that unfairly benefit in-state businesses at the expense of their out-of-state competitors. Nor may states inhibit the ability of citizens of other states to earn a living, exercise property rights, or enjoy equal access to public proceedings.

At issue here is a Virginia policy that discriminates in each of these respects by blocking the free flow of public information across state borders—information that is traded in a robust national market, essential to exercising important legal rights, and critical to an enormous range of activities that require data from all 50 states. Virginia's policy thus runs headlong into two constitutional commands—that “a State must accord residents and nonresidents equal treatment” on matters “bearing on the vitality of the Nation as a single entity,” *Supreme Court of Va. v. Friedman*, 487 U.S. 59, 64-65 (1988), and that a state law that “discriminates against interstate commerce” is “virtually *per se* invalid,” *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 338 (2009).

To be sure, discriminatory laws are sometimes warranted by important state interests. But such laws must be tested. States must justify their discrimination. Here, Virginia makes no effort to justify its discrimination or deny that its law has a distorting and anticompetitive effect on the national market for public information. Having failed below to establish that responding to non-citizens' public-record requests imposes *any* cost on the state or its taxpayers—because the state can fully recoup its actual costs—Virginia has now abandoned the one justification it put forward in the courts below. This leaves the state with the following defense: Virginia discriminates simply because it believes it can.

**A. The Citizens-Only Policy Violates the Privileges and Immunities Clause.**

1. Because Roger Hurlbert gathers public records for a living, and because Virginia bars him from gathering those records in Virginia while making them available to in-state businesses, Hurlbert has made out a “classic common-calling claim under the Privileges and Immunities Clause.” Pet. App. 72a (Gregory, J., concurring). Virginia neither disputes that the Clause “guarantees to citizens of State A” the right to “do[] business in State B on terms of substantial equality with the citizens of that State,” *Toomer v. Witsell*, 334 U.S. 385, 396 (1948), nor attempts to justify its discriminatory treatment. Nonetheless, the state asks this Court to uphold its citizens-only policy on the theory that it only “indirectly disadvantage[s],” and has an “incidental effect” on, Hurlbert’s business. Va. Br. 20. That argument fails on the facts and the law.

On the facts, as demonstrated in our opening brief (at 32-34, 36-39), the effect of the citizens-only policy on Hurlbert’s business is anything but indirect. The policy completely cuts off Hurlbert and other commercial data gatherers from doing business in Virginia (unless they hire Virginians to perform a task they could more efficiently perform themselves). Hurlbert makes his living exclusively by “obtain[ing] documents from real property assessment officials” on behalf of his clients. CA4 JA 47A. He cannot carry out his business in the state if the law blocks him from obtaining records from those officials. For Hurlbert and others like him, Virginia’s law is not just “virtually exclusionary,” *Toomer*, 334 U.S. at 397, but actually exclusionary.

On the law, Virginia claims (at 20) that discriminatory laws that “indirectly disadvantage” out-of-state busi-

nesses are “upheld as a matter of course.” But the cases Virginia cites do not support that proposition—or even discuss the common-calling privilege. *Zobel v. Williams*, 457 U.S. 55 (1982), *struck down*—under the Equal Protection Clause—a law distributing Alaska’s natural-resources income based on each citizen’s length of residence. And *Chemung Canal Bank v. Lowery*, 93 U.S. 72 (1876), upheld a provision tolling Wisconsin’s statute of limitations for locals, but did so because Wisconsin had a “valid reason for the discrimination” consistent with interstate comity—its interest in upholding other states’ statutes of limitations and protecting out-of-staters from surprise. *Id.* at 77. Neither case helps the state.

As our opening brief explained (at 37-39), the relevant inquiry is not whether a state law openly discriminates against non-resident businesses but whether that is “the practical effect of the provision.” *Lunding v. N.Y. Tax Appeals Tribunal*, 522 U.S. 287, 299 (1998); *see also Chalker v. Birmingham & Nw. Ry. Co.*, 249 U.S. 522, 526-27 (1919) (“[N]either under form of classification nor otherwise may a state enforce laws that in their “practical operation materially abridge or impair the equality of commercial privileges secured by the federal Constitution to citizens of the several states.”). In *Lunding*, the Court concluded that a Connecticut resident’s right to “carry on business” in New York was impermissibly burdened under the Privileges and Immunities Clause by a New York income-tax provision that precluded non-residents from deducting personal alimony payments. 522 U.S. at 296 (quoting *Shaffer v. Carter*, 252 U.S. 37, 56 (1920)). Although the New York law was directed at personal alimony payments generally rather than any occupation or business, the Court reasoned that it would effectively burden “the right of nonresidents to pursue their livelihood on terms of substantial equality with res-



idents” and, absent a “substantial justification,” was therefore invalid. *Id.* at 302, 315.

In a footnote, Virginia dismisses *Lunding*, *Chalker*, and similar cases as involving “discriminatory taxation of nonresident businesses or workers,” Va. Br. 20 n.2, without explaining why that distinction should make any difference. If anything, given state legislatures’ “considerable discretion in formulating tax policy” to serve “local needs,” *Lunding*, 522 U.S. at 297, this Court’s scrutiny of tax laws under the Privileges and Immunities Clause is more deferential than it is for other laws. And the focus on a discriminatory law’s “practical effect” is not limited to tax cases. *See Toomer*, 334 U.S. at 397. In any event, the practical effect of Virginia’s exclusionary citizens-only policy on Hurlbert’s right to do business is far more direct than the impact of New York’s denial of personal alimony deductions in *Lunding* (which discriminated against, but did not exclude, non-resident workers).

Virginia does not deny that “[t]he vast majority” of public-records requests “are made by businesses for commercial purposes,” Solove, *Access and Aggregation: Public Records, Privacy, and the Constitution*, 86 Minn. L. Rev. 1137, 1139 (2002), or that most out-of-state requests to Virginia government agencies are made by commercial requesters. *See* Pet. Br. 10, 33. Indeed, Virginia’s amici admit that the citizens-only policy is used to selectively target out-of-state businesses for discriminatory treatment: whereas certain non-commercial requests are “typically” honored, “requests from out-of-state data mining companies” are categorically “denied under the citizens-only provision.” Local Gov’t Attorneys Br. 29-30 (describing county’s enforcement policy).

2. Reciting a list of statutes, Virginia next contends (at 21-22) that “Hurlbert’s property argument is mis-



placed” because certain types of property records are exempt from the state’s Freedom of Information Act and available through the other statutes. But Hurlbert did not request those types of records, and his request does not involve those statutes. As Virginia admits, he requested “real estate tax assessment records from the Tax Assessor of Henrico County.” Va. Br. 9. There is no dispute that Virginians—and only Virginians—have the right to access such records. See *Associated Tax Serv., Inc. v. Fitzpatrick*, 372 S.E.2d 625, 626-29 (Va. 1988) (ordering disclosure under VFOIA of the “1985 Land Books Master Record for the City of Norfolk,” including information about the “assessed value of the land” and “total assessed value” for all real property in the city, as requested by a Virginia company “in the business of facilitating the payment of real estate taxes”). Nor is there any dispute that Virginia denied Hurlbert access to those records solely because he is not a Virginian. CA4 JA 47A.

Virginia likewise does not dispute that access to real estate tax assessment records—no less than access to deeds or mortgages—is inextricably intertwined with the right to transfer property. Tax assessment records are used for a variety of purposes that “facilitat[e] the transfer of title to real property, such as title searching, the issuance of title insurance, mortgage origination, and other common activities related to the sale and financing of property.” Barber, *Personal Information in Government Records*, 25 St. Louis U. Pub. L. Rev. 63, 116 (2006). The FBI, for example, advises prospective homebuyers to “look into recent tax assessments of neighbor-

hood homes” to help avoid falling victim to mortgage fraud.<sup>1</sup>

Hurlbert’s business serves these purposes. He provides his clients—like the “land/title company” that hired him here—with “copies of computer readable databases of property ownership, valuations, land tenure, and land use” to use, among other things, to verify mortgage loan applications and appraisal reports. CA4 JA 47A. Those uses are critical to mortgage financing and real estate transactions and thus “basic to the maintenance or well-being of the Union.” *Baldwin*, 436 U.S. at 388. Virginia does not confront these facts. And so it does not even grapple with, let alone rebut, our argument that access to property records, including tax assessment records, is protected by the Privileges and Immunities Clause because it is a necessary corollary to “the ability to transfer property.” *Id.* at 387.

Instead, Virginia disparages Hurlbert’s position as “ahistorical,” calling it the product of a “recently invented” “modern statutory creation.” Va. Br. 10, 18. But that has it exactly backwards. Virginia’s Freedom of Information Act is a modern creation, but the right of equal access to property records is anything but. Had Hurlbert requested copies of the *very same records* at the time of the Founding, he would have been entitled to them. A 1786 Virginia statute provided that tax assessment records “shall be subject at all times to the inspection of every person” and that “copies may be had at the charge of the person or persons desiring” the record. 12 *Henning’s Statutes at Large* 247-48 (1786); see also *Kinney v.*

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<sup>1</sup> See FBI, *Mortgage Fraud: How to Avoid Becoming a Victim*, [http://www.fbi.gov/news/stories/2008/august/mortgagefraud\\_081408](http://www.fbi.gov/news/stories/2008/august/mortgagefraud_081408).

*Beverley*, 12 Va. (2 Hen. & M.) 318, 330-31 (1808) (Tucker, J.) (noting tax assessors' duty to ensure that land valuations were "subject at all times to the inspection of all persons"). Likewise, as discussed in our opening brief (at 39), "any person or persons, not resident within this state" had a right to demand copies of surveyors' land records, 12 *Hening's Statutes at Large* 589-90 (1787)—a right enforceable in court, *Preston v. Brown*, 20 Va. (6 Munf.) 271 (1819).

Thus, for all of Virginia's invocation of history, it is actually the state's citizens-only restriction that is the "recently invented" approach—an approach it now shares with only Arkansas and Tennessee. If this Court were to give Virginia's discriminatory approach its blessing, however, that would invite other states to adopt similar parochial measures, thereby hindering property transfers across state lines, stifling competition among data gatherers, and introducing needless inefficiencies into the national market for public information. This Court should bring Virginia into line with the 47 states that allow open access—not pave the way for more discriminatory-access regimes.

3. Virginia next derides as "incoherent" (at 22) our argument concerning Mark McBurney's request for agency records. McBurney requested public records reflecting the general policies that Virginia employed to handle his child-support-collection case before a state agency, but Virginia refused his request based solely on state citizenship. As our opening brief showed (at 42-44), that refusal violates the venerable rule that public proceedings "must remain open" to citizens and non-citizens "on the same basis." *Miles v. Ill. Cent. R.R.*, 315 U.S. 698, 703 (1942); see *Blake v. McClung*, 172 U.S. 239, 256 (1898). It also burdens the protected right of creditors

like *McBurney* to collect debts on equal terms with state citizens—a right central to the Framers' concerns in both the Privileges and Immunities Clause and neighboring Full Faith and Credit Clause. *See* Pet. Br. 42-43.

Virginia does not deny that the Constitution guarantees equal access to public proceedings to citizens and non-citizens alike, whether before a court or an administrative agency. Nor does Virginia deny that equal access to such proceedings necessarily encompasses equal access to basic information about how those proceedings are conducted. Instead, Virginia's only response (at 22) appears to be that these rights are not "implicated" because *McBurney* managed to obtain *some* records related to his case. Va. Br. 22. But Virginia does not contest the two most relevant facts: (1) that *McBurney* "sought documents concerning practices and procedures of the agency" with respect to the handling of cases like his and (2) that he has been denied access to those documents solely because of his citizenship. Va. Br. 22; *see also* *McBurney v. Cuccinelli*, 616 F.3d 393, 403 (4th Cir. 2002) (noting that this fact is "undisputed").

The upshot of Virginia's position is that state agencies may give in-state businesses and individuals a crucial information advantage over their out-of-state adversaries in administrative proceedings—letting citizens know the rules of the game while keeping their competitors in the dark. And states could do this in all kinds of proceedings—adjudications, rulemakings, decisions to grant or deny important permits—over the full range of social and economic activity.

Nothing would stop the Arkansas Oil and Gas Commission, for example, from providing only Arkansas businesses with important information about how it decides to grant valuable oil-drilling permits. Or New York



banking regulators from ensuring that only New York investors and lawyers have special access to information about the state's regulatory climate.

If such information asymmetries were allowed to flourish, states would be able to favor in-state interests with impunity, achieving by other means the same results as old-fashioned protectionist regulation. South Carolina may not exclude Georgia shrimpers from its waters, see *Toomer*, 334 U.S. at 403, but it could make sure they don't know the ins-and-outs of the state's licensing scheme. A New Jersey city may not deny out-of-staters construction jobs, see *United Bldg. & Constr. Trades Council v. Mayor & Council of Camden*, 465 U.S. 208, 220 (1984), but it could ensure that only locals know how to navigate the complex procurement application process. Virginia does not even attempt to defend the logic of this discriminatory regime.

4. Finally, arguing from history (at 23-31), Virginia contends that it may, consistent with the Privileges and Immunities Clause, deny citizens of other states equal access to public information without justification. But the state never grapples with what both sides agree is the applicable test: States must "treat all citizens, resident and nonresident, equally" "with respect to those 'privileges' and 'immunities' bearing upon the vitality of the Nation as a single entity, or that are 'basic to the maintenance or well-being of the Union,' or 'the livelihood of the Nation.'" Va. Br. 32 (quoting *Baldwin*, 436 U.S. at 383, 388). The question under this Court's cases is whether equal access to public information meets that test. Although Virginia never confronts this question, it cannot deny that the interstate movement of public-record information is "important to the national economy," *Supreme Court of N.H. v. Piper*, 470 U.S. 274, 281



(1985), that a wide range of “essential activit[ies]” rely on publicly available data, *Baldwin*, 436 U.S. at 281, or that public records are vital to securing property and other fundamental interests.<sup>2</sup>

As our opening brief pointed out (at 22-23, 45), the Full Faith and Credit Clause demonstrates that the Framers saw that the movement of “public ... Records” across state lines as critical to Americans’ ability to secure property rights and other important interests, and “fundamental to the promotion of interstate harmony.” *United Bldg.*, 465 U.S. at 218 (quoting *Baldwin*, 436 U.S. at 388). But one can hardly use a state’s public records to advance his or her rights without having access in the first place. A few examples: An Indiana business that lost out on a government contract could not see the winning bid—putting it at a disadvantage compared to its Virginia-based competitor. A Maryland developer looking to buy land in Virginia could not obtain information about zoning plans, crime statistics, or past sales, but a Virginia developer could. And an Ohio journalist who does not qualify for Virginia’s media exception—which applies only to traditional media “with circulation in the Commonwealth,” Va. Code § 2.2-3704(A)—would be at a

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<sup>2</sup> Virginia also gets its history wrong. It cherry-picks a handful of cases to try to show that, at the Founding, common-law “rights of public access were not sufficiently uniform or generous.” Va. Br. 30; *but see* Public Justice Br. 3-15 (showing that the right was universal, though its scope varied). But none of Virginia’s cases is from the Founding Era; the earliest is an English case from 1837. Regardless, it does not matter whether the right’s scope was sufficiently “uniform” or “generous” in 1789 because the Clause places citizens and non-citizens on “the same footing” with respect to protected rights, leaving the precise scope of those rights to state positive law. *Paul v. Virginia*, 75 U.S. 168, 180 (1869).

disadvantage in reporting on stories of national significance. *See* Reporters Committee Br. 3-4, 21-35.

Because public records contain important facts, “restrictions on the disclosure of government-held information can facilitate or burden the expression of potential recipients and so transgress the First Amendment.” *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2666 (2011); *see Los Angeles Police Dep’t v. United Reporting Pub. Corp.*, 528 U.S. 32, 42 (1999) (Scalia, J., concurring) (suggesting that “a restriction upon access that *allows* access to the press ... but at the same time *denies* access to persons who wish to use the information for certain speech purposes, is in reality a restriction upon speech”). Although this is not a First Amendment case, those same burdens also run afoul of the Privileges and Immunities Clause when imposed on the basis of state citizenship because they impede the ability of non-residents to report or sell information (as in Hurlbert’s case) or advocate for private interests (as in McBurney’s). *See Lee v. Minner*, 458 F.3d 194, 200 (3d Cir. 2006).

The consequences of discriminatory-access regimes like Virginia’s, if allowed to multiply, would be intolerable in many areas of national life. Faced with a Balkanized access regime, the credit reporting system “simply would not work”—reporting agencies would be forced to hire locals to obtain records or risk selling incomplete or inaccurate data. *See* Coalition for Sensible Public Records Br. 37-38. Landlords and employers, who depend on background checks to safeguard property and ensure a “competent, reliable workforce,” *NASA v. Nelson*, 131 S. Ct. 746, 758 (2011), would be left vulnerable by the “resulting gaps.” Coalition Br. 27-28, 31. And because state public records are “the primary source of the most fundamental public health information,” medical research-

ers' ability to measure the "incidence and prevalence of disease[s]" would be hindered. ACLU Br. 7-8. "With respect to such basic and essential activities, interference with which would frustrate the purposes of the formation of the Union, the States must treat residents and nonresidents without unnecessary distinctions." *Baldwin*, 436 U.S. at 387.

## **B. The Citizens-Only Policy Violates the Dormant Commerce Clause.**

Our opening brief explains (at 24-30) that a state law that "discriminates against interstate commerce," as Virginia's does, is "virtually *per se* invalid and will survive only if it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Davis*, 553 U.S. at 338 (internal quotation marks and citations omitted). Virginia does not attempt to satisfy that test.

1. Echoing its response to our Privileges and Immunities Clause claim, Virginia contends that this heavy burden does not apply here because its policy has only "contingent, remote or incidental effects on commerce." Va. Br. 37. Virginia's sole support for that point is its claim that "Hurlbert's scant earnings" and "the thin evidence that similar companies exist" fail to demonstrate "an unreasonable burden on interstate commerce." *Id.* at 38. But the state concedes that "purveyors of data request public records and employ themselves gainfully in their sale." *Id.* at 38 n.10. Hurlbert himself earns his living requesting such records. His personal profits for 2007, for example, were about \$89,000, CA4 JA 101A—not "scant earnings" for most Americans. And several larger commercial data aggregators, such as amici CoreLogic and Reed Elsevier's LexisNexis division, have billion-dollar

annual revenues.<sup>3</sup> More importantly, Virginia does not deny that its policy facially discriminates against non-Virginians or that the vast majority of records requests by non-citizens come from commercial data gatherers. *See* Pet. Br. 33. The primary effect of the citizens-only restriction is thus to immunize Virginia records-retrieval businesses from out-of-state competitors like Hurlbert and the amici.<sup>4</sup>

In any event, petitioners are not required to make the “particularized showing of the sort [Virginia] seeks.” *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Maine*, 520 U.S. 564, 581 n.15 (1997). “[T]here is no ‘de minimis’ defense” to discrimination against interstate commerce, *id.* (citing *Assoc. Indus. of Mo. v. Lohman*, 511 U.S. 641, 650 (1994)), because “even the smallest scale discrimination can interfere with the project of our Federal Union,” *id.* at 595. Both on its face and in “practical effect,” *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979), Virginia’s citizens-only policy denies noncitizens the ability to pursue the records-retrieval business in Virginia on equal footing with Virginians. Nothing more is required to trigger Virginia’s burden of showing that its restriction serves some legitimate state interest.

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<sup>3</sup> *See* CoreLogic 2011 Annual Report at 12 & 14 (more than \$1 billion combined for data-analytics and mortgage-origination segments); LexisNexis Risk Solutions, <http://reporting.reedelsevier.com/ar11/business-review/lexisnexis-risk-solutions/> (more than \$1.4 billion).

<sup>4</sup> *See* Public Record Retriever Network, Membership List for 2013: Virginia, <http://www.brbpublications.com/prrn/search.aspx> (listing a dozen Virginia companies specializing in public records retrieval); <http://www.researchandretrievals.com> (website of Research and Retrieval Services, Inc., “a public records research company in the Southeastern section of Virginia” that “specialize[s] in real estate title searches,” including tax assessor records).



2. Virginia's contention (at 38) that the "effects component for dormant Commerce Clause analysis" is reserved for the "second-tier analysis" under *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), is mistaken. This Court has repeatedly held that the dormant Commerce Clause prohibits state laws that "discriminate[] against interstate commerce *either* on [their] face or in practical effect." *Hughes*, 441 U.S. at 336. Virginia's own brief acknowledges as much, noting that so-called "[f]irst-tier analysis is ... triggered 'where a state law discriminates facially, in its practical effect, or in its purpose against interstate commerce.'" Va. Br. 37 (citation omitted).

Virginia's reliance on what it calls "the Necessary and Proper Clause's substantial effects prong of Interstate Commerce Clause doctrine," Va. Br. 39, is likewise flawed. Setting aside whether such a "prong" exists, Virginia does not deny that "[t]he definition of 'commerce' is the same when relied on to strike down or restrict state legislation as when relied on to support some exertion of federal control or regulation." *Camps Newfound*, 520 U.S. at 574. This Court's holding in *Reno v. Condon*, 528 U.S. 141, 148-49 (2000)—that public records' "sale or release into the interstate stream of business" constitutes interstate commerce—thus applies with full force here.

3. Relying on *Davis*, Virginia argues that providing access to public records is a "government function" and thus that its facial discrimination against citizens of other states is not "susceptible to standard dormant Commerce Clause scrutiny." Va. Br. 40 (quoting *Davis*, 553 U.S. at 341). Virginia's characterization of its public-records law as a "*traditional* government function" is, at the very least, inconsistent with its earlier characterization of the law—for purposes of the Privileges and Immunities Clause—as a state function of recent vintage. More importantly, Virginia misunderstands the meaning of "traditional government function" as used in *Davis*. As



the Court explained there, "the enquiry about traditional governmental activity" is not aimed at the nature of the particular function, which would require the Court to "draw fine distinctions among government functions." *Davis*, 553 U.S. at 341 n.9. Rather, "[t]he point of asking whether the challenged governmental preference operate[s] to support a traditional public function" is to "identify the beneficiary" of the challenged law—that is, "to find out whether the preference [is] for the benefit of a government ... or for the benefit of private interests, favored because they [are] local." *Id.*; see also *United Haulers*, 550 U.S. at 334 (upholding law requiring waste haulers to use a state-owned processing facility because the law, while favoring a state-owned facility, "treat[ed] every private business, whether in-state or out-of-state, exactly the same").

In other words, this Court distinguishes between laws favoring local *governments* from those favoring local *private* interests, and for good reason: "discrimination assumes a comparison of substantially similar entities." *Id.* at 342. Governments, unlike businesses, are "vested with the responsibility of protecting the health, safety, and welfare of [their] citizens." *Id.* "[I]t does not make sense to regard laws favoring local government and laws favoring private industry with equal skepticism." *Id.* at 343.

Unlike the laws in *Davis* and *United Haulers*, Virginia's citizens-only restriction does not favor its own interests while treating in-state and out-of-state businesses "exactly the same." Virginia is not discriminating in favor of itself—it is discriminating against *private* businesses that, like Hurlbert's, make use of public records, and it does so based solely on the requester's citizenship. The "[c]ompelling reasons" that justified a lower level of scrutiny in *United Haulers* and *Davis* are thus inapplicable here. *United Haulers*, 550 U.S. at 342. There is no

reason to assume that laws that facially discriminate in favor of local private interests, are "likely motivat[ed] by legitimate objectives." Va. Br. 40 (quoting *Davis*, 553 U.S. at 341). Indeed, Virginia has identified *no* state interest that is served by its facially discriminatory policy.<sup>5</sup>

Virginia's reliance on *Reeves v. Stake*, 447 U.S. 429 (1980), for the proposition that "fulfilling governmental functions is not 'protectionist,'" Va. Br. 41, is equally unavailing. As *Reeves* makes clear, a state may decide who may use its resources when it participates "freely in the free market." 447 U.S. at 437. But Virginia does not argue that it is participating "freely in the free market." In fact, it argues the opposite: that it is engaged in a traditional, noncommercial government function. The "traditional" nature of the government activity does not immunize it from dormant Commerce Clause scrutiny. There is, for example, no more "traditional public function" than the exercise of a state's taxing authority, but the Court has not hesitated to invalidate state tax schemes that favor local business interests over those of other states. See, e.g., *Pennsylvania v. West Virginia*, 262 U.S. 553, 596 (1923).

4. Even if Virginia were correct that its citizens-only policy is entitled to only "second-tier" dormant Commerce Clause scrutiny, that scrutiny would not be based on the *Pike* balancing test, as Virginia contends. Va. Br. 37-38. That test applies only when the challenged state law is neither facially nor effectively discriminatory

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<sup>5</sup> Whereas *Davis* was concerned with the "unprecedented" interference involved in invalidating a "century-old taxing practice presently employed by 41 states," 553 U.S. at 342, a decision sustaining Virginia's restriction here could encourage similar restrictions, threatening the open-access regime that now prevails in 47 states. Pet. Br. 10-12.

against non-residents. *Hughes*, 441 U.S. at 336; *Pike*, 397 U.S. at 142-43. Virginia's citizens-only restriction does not "regulate[] even handedly," *id.* at 142; indeed, its facial discrimination against non-residents is the sole reason that Hurlbert was denied the property records he requested.

Rather, Virginia's plea for "second-tier" scrutiny appears to be based on the theory that, despite its facial discrimination against non-Virginians, the citizens-only policy does not expressly target commerce. Va. Br. 37-38. But, again, commercial records requests—which make up the vast majority of public-records requests—are interstate commerce. *Reno*, 528 U.S. at 148-49. And whatever the legislature's express intent, there is no dispute that out-of-state commerce bears the brunt of Virginia's ongoing enforcement of its citizens-only policy. See Pet. Br. 33. Moreover, as our opening brief explained (at 30-32), "the purpose of, or justification for, a law has no bearing on whether it is facially discriminatory." *Or. Waste Sys., Inc. v. Dep't of Env'tl. Quality of Or.*, 511 U.S. 93, 100 (1994); see *Camps Newfound*, 520 U.S. at 581 (generally applicable property-tax exemption for non-profit charities serving state residents failed first-tier scrutiny).

But even assuming that Virginia's citizens-only policy were entitled only to "second-tier" scrutiny analogous to that under *Pike*, it could not survive that scrutiny because, as discussed below, Virginia has abandoned any effort to justify its policy. Without at least *some* counter-vailing state burden to place on the state's side of the

scale, Virginia's citizens-only policy cannot survive any balancing test.<sup>6</sup>

### **C. Virginia Has Abandoned Its Only Justification For Its Discrimination.**

Virginia does not deny that, in the lower courts, it advanced only one justification for its citizens-only restriction: that the administrative costs required to give non-Virginians access to public records would reduce resources available for Virginians. *See* Pet. Br. 47. But although Virginia had every opportunity to build a record to support that justification, it never did so. To the contrary, Virginia failed to show that responding to non-citizens' requests would impose *any* cost on the state.

That is not surprising because, as our opening brief pointed out (at 49–50), Virginia's statute allows it to charge requesters not only for the cost of duplicating and delivering records, but also for *all administrative costs* incurred in “accessing,” “supplying,” and “searching for” those records, and it allows the state to require payment in advance for all requests for which costs exceed \$200. Va. Code § 2.2-3704(F); *see* Va. CA4 Br. 42 (conceding

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<sup>6</sup> Rather than attempt to satisfy even the “second-tier” analysis it advocates, Virginia contends (at 38) that we have “procedurally defaulted” any challenge under that analysis. But, as explained in our opening brief (at 52–53 n.13), this Court will engage in second-tier analysis even when a party maintains that first-tier scrutiny is required. *Gen. Motors v. Tracy*, 519 U.S. 278, 298 n.12 (1997). Virginia's only response to *Tracy*—to reiterate its waiver argument (at 38 n.9)—is a non sequitur. Moreover, we affirmatively argued below that Virginia's policy fails under any level of scrutiny. *See* CA4 Br. 13–14 (“The district court erred by relying on the *Pike* balancing test, which is reserved for evaluating evenhanded statutes. In any event, there are no countervailing legitimate concerns to justify limiting access to public records in Virginia.”); *id.* at 40–42.



“that the government can recoup its copying and administrative costs”). In its brief to this Court, Virginia no longer advances its cost-based justification and argues only that it “has no burden” to do so. Va. Br. 36. The state has thus failed to establish—and has now abandoned—its only justification for its citizens-only restriction on public records access.<sup>7</sup>

For the first time in this litigation, Virginia’s brief to this Court suggests (at 31) that some newfound “substantial interest” may justify its discriminatory policy, but it never spells out what that interest is. Here is what the state says: “The traditional state practice of distinguishing between citizens and noncitizens in the provision of services not involving fundamental rights—and making such distinction in laws intended to govern the political functioning of the state—itself provides substantial reasons for the distinction made here.” Va. Br. 36.

To the extent that Virginia is asserting a new justification based on a “traditional state practice,” that justification fails because, as discussed above (at 6-7), the

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<sup>7</sup> Virginia suggests in passing (at 2) that its taxpayers bear “a significant portion of the costs associated with the provision of public records,” but cites no support for that statement. To the contrary, Virginia is authorized by statute to fully recoup its costs. The only limit is that the fees may not *exceed* the “actual cost incurred” or cover the costs of “creating or maintaining records” or “transacting the general business of the public body,” Va. Code § 2.2-3704(F). But those excess costs by definition are not the costs of *responding* to requests. The state is only required to produce records already created “in the transaction of public business”—not to “create ... new record[s]” that “do[] not already exist,” *id.* §§ 2.2-3701, 2.2-3704(D). The law thus merely prohibits Virginia from *profiting* from fees that go beyond full cost recovery.



state's discriminatory policy actually runs counter to traditional practice. To the extent that Virginia is asserting an interest based on "the political functioning of the state," that interest fails because "[t]here is no evidence that allowing noncitizens to directly obtain information will weaken the bond between the [state] and its citizens." *Lee*, 458 F.3d at 201. And to the extent that Virginia is asserting a new interest on the grounds that public-records access is merely "the provision of [a] service[]" funded by Virginians' tax dollars, that is just a restatement of its now abandoned administrative-burden argument. Access to a state's court system or agencies (such as those that grant fishing licenses or regulate lawyers) can just as easily be characterized as a tax-funded service. But when a state's discrimination interferes with protected rights, the state must prove, with evidence, that "moneys received from nonresident[s] will not be adequate to pay for any administrative burden." *Barnard v. Thorstenn*, 489 U.S. 546, 556 (1989); Pet. Br. 50. Even then, the "drastic" step of "total exclusion" is unwarranted where a state has the ability to "charge non-residents a differential which would merely compensate the State for any added enforcement burden they may impose." *Toomer*, 334 U.S. at 398-99.

Neither of Virginia's examples of "services" that are properly limited to residents—elections and schools (Va. Br. 33-34)—involve burdens on protected rights, and both illustrate how states can justify their policies with substantial state interests. Citizenship limitations, of course, are necessary for elections to have any meaning. *Dunn v. Blumstein*, 405 U.S. 330, 343-44 (1972). And "the proper planning and operation of the schools would suffer significantly" absent residence restrictions. *Martinez v. Bynum*, 461 U.S. 321, 329 & n.9 (1983) (factual findings concerning likelihood of fluctuating populations,

overcrowding, and resource constraints). The “deeply rooted” tradition of “local control over the operation of schools” is also an “independent justification for local residence requirements.” *Id.* at 329. And there are similar “substantial reason[s] for requiring the nonresident to pay more than the resident ... to enroll in the state university.” *Saenz v. Roe*, 526 U.S. 489, 502 (1999) (citing *Vlandis v. Kline*, 412 U.S. 441, 445 (1973)). But here—where extending access to non-residents would not cost the state a dime, would not deplete finite resources, and would not jeopardize important local traditions or institutions—erecting a barrier to the free flow of information across state borders serves no legitimate purpose. That is particularly so because the state seeks to withhold access to public information that is available nowhere else, is essential to securing private property and other basic interests, and is critical to the nation’s information economy.

In the end, Virginia’s “bare assertion” of some inchoate interest in its citizens-only policy at the thirteenth hour “is certainly inadequate to survive the scrutiny invoked by [its] facial discrimination.” *Hughes*, 441 U.S. at 338 n.20. “The late appearance” of Virginia’s vague argument “and the total absence of any record support ... give it the flavor of a *post hoc* rationalization.” *Id.* Because the “burden is on the State to show that the discrimination is demonstrably justified,” *Chemical Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 344 (1992), “[t]his Court has upheld state regulations that discriminate against interstate commerce only after finding, based on concrete record evidence, that a State’s nondiscriminatory alternatives will prove unworkable,” *Granholt v. Heald*, 544 U.S. 460, 492-93 (2005). Virginia does not even attempt to satisfy that “exacting standard.” *Id.* at 493. This leaves the state with “no substantial reason for

the discrimination beyond the mere fact" that Hurlbert and McBurney "are citizens of other States." *Toomer*, 334 U.S. at 396. Discrimination, however, cannot justify discrimination.

### CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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**AMICUS  
CURIAE  
BRIEF**

RECORD  
AND  
BRIEFS

No. 12-17

Supreme Court, U.S.  
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IN THE  
**Supreme Court of the United States**

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MARK J. MCBURNEY AND ROGER W. HURLBERT,  
*Petitioners,*

*v.*

NATHANIEL YOUNG, JR., Deputy Commissioner and  
Director, Division of Child Support Enforcement,  
Commonwealth of Virginia, and THOMAS C. LITTLE,  
Real Estate Assessment Division, Henrico County,  
Commonwealth of Virginia,  
*Respondents.*

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ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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BRIEF FOR AMICI CURIAE AMERICAN CIVIL  
LIBERTIES UNION, ET AL., IN SUPPORT OF  
PETITIONERS

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## INTEREST OF AMICI CURIAE<sup>1</sup>

*Amici* are public-interest organizations committed to government transparency and accountability. As such, they are well-positioned to attest to the benefits of broadly inclusive state freedom of information laws. Additionally, *amici* are knowledgeable about the harms that citizens-only provisions inflict upon non-citizen professionals dependent on access to state public records for their livelihoods, non-citizens who wish to reside and purchase property in other states, and non-citizens who wish to engage in political advocacy in states with citizens-only provisions.

The **American Civil Liberties Union (ACLU)** is a nationwide, nonpartisan, nonprofit organization with approximately 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The **ACLU of Virginia** is a state affiliate of the national ACLU. The ACLU frequently relies on state freedom of information laws in furtherance of its advocacy efforts. In addition, documents obtained through freedom of information requests filed by other organizations and individuals are often critical in shaping the ACLU's response on a range of important civil liberties issues. Founded in 1920, the ACLU has appeared before this Court on numerous occasions, both as direct counsel and as *amicus curiae*.

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<sup>1</sup> Letters consenting to the filing of this *amicus curiae* brief have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person, other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

The **American Library Association (ALA)**, established in 1876, is a nonprofit professional organization of more than 58,000 librarians, library trustees, and other friends of libraries dedicated to providing and improving library services and promoting the public interest in a free and open information society.

**Citizens for Responsibility and Ethics in Washington (CREW)** is a nonprofit organization based in Washington, DC dedicated to promoting ethics and accountability in government. CREW advances its mission using a combination of research, litigation and media outreach to ensure officials act ethically and lawfully and to bring unethical conduct to the public's attention. Toward this end, CREW regularly files public records requests with state and federal agencies.

The **Center for Media and Democracy (CMD)** is a nonpartisan, non-profit investigative reporting group based in Madison, Wisconsin. CMD is committed to "citizen journalism" as an alternative to mass media, producing hundreds of original stories that promote corporate and government accountability.

The **Electronic Frontier Foundation (EFF)** is a non-profit, member-supported civil liberties organization with offices in San Francisco, California and Washington, DC that works to protect rights in the digital world. EFF actively encourages and challenges industry, government, and the courts to support free expression, privacy, and transparency in the information society. In support of its mission, EFF regularly files public records requests with state and federal agencies in order to better understand the ways law enforcement agencies use technology. In the past year, EFF has filed such requests in seven different states.



The **Electronic Privacy Information Center (EPIC)** is a non-profit research center located in Washington, DC. EPIC pursues numerous Freedom of Information Act cases with federal agencies and also publishes a leading FOIA manual, *Litigation Under the Federal Open Government Laws*. EPIC has litigated FOIA cases under the Virginia open records law. As a result, EPIC is intimately familiar with the freedom of information law at the heart of this lawsuit—including the citizens-only provision—and is well-suited to aid the Court in considering its constitutionality.

The **National Freedom of Information Coalition (NFOIC)** is a nonprofit organization that works to raise public awareness about the importance of transparency and to protect the public's right to open government. With offices at the Missouri School of Journalism, NFOIC awards grants to its affiliated state- and region-based freedom of information organizations for their work in fostering, educating, and advocating for open, transparent government. NFOIC also administers the Knight FOI Fund, a half-million-dollar perpetual legal fund to assist litigants advocating for open government in important and meritorious legal cases.

**OpenTheGovernment.org** is a Washington, DC-based nonpartisan coalition of journalists, consumers, good- and limited-government groups, environmentalists, librarians, labor unions, and others whose mission is to increase government transparency to improve public safety and trust, and to promote democratic accountability. OpenTheGovernment.org takes a multi-prong approach to accomplishing its mission through public education, advocacy, and collaboration with government agencies to decrease secrecy.

**The Project On Government Oversight (POGO)** is a nonpartisan, independent investigative organization based in Washington, DC that champions good government reforms. POGO investigates corruption, misconduct, and conflicts of interest in government through freedom of information requests, interviews, and other fact-finding strategies. As a result of these investigations, POGO has found that nondisclosure of government records often is intended to hide corruption, intentional wrongdoing, or mismanagement.

**The Sunlight Foundation** is a nonpartisan, non-profit organization based in Washington, DC that uses the power of the Internet to catalyze greater government openness and transparency. Sunlight is committed to improving access to government information by making it available online, and by creating new tools and websites to enable individuals and communities to better access that information and put it to use. Sunlight also engages in advocacy to require that government make data available in real time and trains thousands of journalists and citizens in using data and the web to be watchdogs.

**The Washington Coalition for Open Government (WCOG), the Virginia Coalition for Open Government (VCOG), and the Tennessee Coalition for Open Government (TCOG)** are nonpartisan, non-profit coalitions dedicated to promoting and defending the right to know. VCOG has kept a log of out-of-state citizens who wished to file Virginia FOIA requests and thus is familiar with both the mechanics and detrimental impact of the citizens-only provision.

## ARGUMENT

The Virginia Freedom of Information Act's citizens-only provision, Va. Code. Ann. § 2.2-3704(A), violates the Privileges and Immunities Clause and the dormant Commerce Clause. Such citizens-only restrictions in open records laws have a concrete, detrimental impact on noncitizens' fundamental rights, including the rights to pursue common callings, reside and purchase property in other states, and participate in political advocacy. Indeed, such effects are felt more acutely in today's highly mobile society in which individuals often have resided in multiple states and increasingly are able to form and maintain professional and personal ties without regard for geographic distance and borders. As a result, under this Virginia law and others like it, noncitizens are *not* on "the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned." *Hicklin v. Orbeck*, 437 U.S. 518, 524 (1978) (quoting *Paul v. Virginia*, 75 U.S. 168, 180 (1869)). This brief documents some of the ongoing harm that noncitizens suffer as a result of such discriminatory laws.

That harm is exacerbated because states with citizens-only provisions—among them, Virginia, Arkansas, and Tennessee—enforce these restrictions inconsistently and often at the whim of the records custodian. Records custodians in these states deny out-of-state requests based on the nature of the request or the identity of the requester, undermining the goals of open records laws.

*Amici* thus urge this Court to make clear that the Constitution does not permit a state to discriminate

against citizens of other states in the scope and application of its open records laws.

# **I. VIRGINIA'S CITIZENS-ONLY PROVISION HARMS NONCITIZENS' CONSTITUTIONALLY PROTECTED RIGHTS**

The Privileges and Immunities Clause prohibits a state from treating citizens of other states in a discriminatory manner. U.S. Const. art. IV § 2. The Clause "place[s] the citizens of each State upon the same footing with citizens of other States" with respect to fundamental rights such as pursuing an occupation, residing in a state, owning property, access to public proceedings and information, and engaging in political advocacy. *Baldwin v. Fish & Game Comm'n*, 436 U.S. 371, 380, 397 (1978) (internal quotation marks omitted); *Lee v. Minner*, 458 F.3d 194, 200 (3d Cir. 2006).

A state violates the Privileges and Immunities Clause when it imposes burdens on noncitizens who seek to exercise these fundamental rights, unless there is a substantial reason for the disparate treatment and the discriminatory practice bears a substantial relationship to the state's objective. *Supreme Ct. of N.H. v. Piper*, 470 U.S. 274, 284 (1985). Virginia has no substantial reason for the disparate treatment of noncitizens, and its discriminatory practice bears no substantial relationship to a proper state objective.

## **A. Right To Pursue A Common Calling**

Virginia's citizens-only provision harms noncitizens who engage in occupations that require access to state public records. States may not discriminate against "nonresidents seeking to ply their trade, practice their occupation, or pursue a common calling within the State." *Hicklin*, 437 U.S. at 524. Access to state public records is crucial to non-residents in a wide range of

occupations, including academics and researchers, journalists, historians, sociologists, and epidemiologists, as well as genealogists, attorneys, land developers, architects, private investigators, and data brokers.

Virginia places non-residents at a disadvantage to state residents. Either non-citizens are denied access to Virginia records, or they must hire a Virginia middleman to request the documents on their behalf, resulting in an added expense that is not borne by their Virginia counterparts. This expense, compounded across multiple requests for records, results in a discriminatory cost of doing business.

Consider, for example, a genealogist hired to chart a client's family tree. Public records are the bread and butter of a genealogist's trade.<sup>2</sup> Suppose the genealogist and his client reside outside of Virginia, but much of the client's family resided in Virginia. Virginia's resident-only requirement would impede the work of the genealogist, with the practical consequence that he would have to hire someone in state to complete the work. This discrimination funnels more business to Virginia genealogists and amounts to an impermissible advantage to Virginia trade members at the expense of noncitizens.

Epidemiology is another important example of a common calling for which access to state public records has long been critical. According to the National Center for Health Statistics and the Centers for Disease

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<sup>2</sup> Association of Professional Genealogists, *The Case for Open Public Records: A Position Paper* (Jan. 3, 2008), <http://www.apgen.org/publications/press/APG-KGROW.pdf>; Bentley, *The Genealogist's Address Book* (4th ed. 1998) (collecting addresses of state vital records departments).



Control and Prevention, “[v]ital records are the primary source of the most fundamental public health information.”<sup>3</sup> Doctors and medical researchers rely on birth and death certificates—state public records that are far more detailed now than in the past—for the “measurement of incidence and prevalence of disease”; for “comparison[s] of disease rates in different populations, in different parts of the same population, and in similar groups over a period of time, in order to develop hypotheses regarding the etiology of disease”; for identification of high risk groups for study or therapy; as a “starting point for ‘follow-back’ studies in which a series of cases with particular characteristics (e.g. dying from a particular disease) is identified”; and as the “end point for studies in which subsets of the population are selected because of their unusual characteristics or environmental exposures and followed to identify diseases or other outcomes suspected of being related to the selected factors.”<sup>4</sup> Such uses of public records can assist with analyzing the development of both chronic and

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<sup>3</sup> Centers for Disease Control and Prevention and National Center for Health Statistics, *U.S. Vital Statistics System: Major Activities and Developments, 1950-95*, at 26 (1997).

<sup>4</sup> National Center for Health Statistics, *Use of Vital and Health Records in Epidemiological Research: A Report of the United States National Committee on Vital and Health Statistics* 1-2 (1968). To be sure, some of these records may be accessible at the federal level through the Census Bureau, which has data-sharing arrangements with the states, but federal aggregation efforts have been, for the most part, deemed widely ineffective. See Diamond et al., *Collecting and Sharing Data for Population Health: A New Paradigm*, 28 *Health Affairs* 454, 455-456 (2009) (analyzing the failures of large-scale data collection efforts of vital statistics). As such, access to state public records for public health purposes remains vital to the profession of epidemiology.

infectious diseases.<sup>5</sup> Citizens-only provisions can place an impermissible burden on an out-of-state epidemiologist or public health professional as compared to her in-state counterparts.

Likewise, historians, sociologists, and other academic researchers rely on access to public records. As one of many examples, state and local public records are integral to the study of African-American history.<sup>6</sup> Historical data relating to population growth, economic trends, and health conditions are uniquely reflected in state and local records. These records also bear on innumerable contemporary issues, from pollution levels to rates of teen pregnancy. A tax-policy researcher, as one example, used state and local records to compare the value of charity care provided by non-profit hospitals to the value of their property tax exemptions.<sup>7</sup>

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<sup>5</sup> See, e.g., Florida Department of Health, *Acute Disease Epidemiology Surveillance, Reporting, and Investigations* (July 2012), available at [http://www.doh.state.fl.us/disease\\_ctrl/epi/Acute/systems.html](http://www.doh.state.fl.us/disease_ctrl/epi/Acute/systems.html); see also Borkowski, *Sunshine Law Helps Reporter Expose Major TB Outbreak in Florida*, *The Pump Handle* (July 12, 2012), available at [http://scienceblogs.com/the\\_pumphandle/2012/07/12/sunshine-law-helps-reporter-expose-major-tb-outbreak-in-florida/](http://scienceblogs.com/the_pumphandle/2012/07/12/sunshine-law-helps-reporter-expose-major-tb-outbreak-in-florida/).

<sup>6</sup> *Sources on African American History*, in *Blacks in East Texas History* 12-13 (Glasrud et al. eds., 2008) ("For the post-1865 period, the records of city councils, health departments, and school boards are valuable sources for studies of topics such as education and law enforcement.").

<sup>7</sup> See Harris & Strouse, *A Cost/Benefit Analysis of Providing Tax-Exempt Status to Non-Profit Hospitals* 3, 13 (May 1997), available at <http://ssrn.com/abstract=72252>; see also Shapiro et al., *The Social Costs of Dangerous Products: An Empirical Investigation*, 18 *Cornell J.L. & Pub. Pol'y* 775, 783 (2009) (analyzing

Novel source materials and newly unearthed facts are the currency of research professions, and state and local government records are treasure troves of such information. Academics and researchers from outside the state encounter greater barriers to these resources in Virginia than their in-state counterparts.

Access to public records is equally vital in other occupations. Land developers need access to documents such as title records, zoning plans, crime statistics, and school-performance data when selecting the best sites for their projects. Journalists need access to public records to break stories—especially those about government officials. Private investigators, architects, and data brokers also require frequent access to public records.

This Court has repeatedly “found that one of the privileges which the Clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State.” *Piper*, 470 U.S. at 280 (internal quotation marks omitted). This broad privilege protects against even incidental burdens to pursuing one’s occupation. For example, this Court cited the privilege in striking down a state income tax provision that discriminatorily barred nonresidents from deducting alimony payments. See *Lunding v. New York Tax Appeals Tribunal*, 522 U.S. 287, 302 (1998). The Court reasoned that the state had not presented a substantial justification for the difference in tax burdens between citizen and noncitizen workers. *Id.* at 315. Likewise, in each of the above examples and in numerous others, Virginia’s citizens-only

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product liability case awards data gleaned from state and county public records).

provision discriminatorily burdens nonresidents who request Virginia records in pursuit of their work.

As *Lunding* illustrates, it does not matter if a discriminatory burden is imposed indirectly or directly. Yet the Fourth Circuit held otherwise in this case, stating that, “[w]hile it may be true that VFOIA coincidentally limits a method by which Hurlbert conducts some of his business, it does not follow that the VFOIA impermissibly burdens his ability to pursue his common calling within the Commonwealth in a Privileges and Immunities Clause context. As the district court found, “[t]he statute’s effect on Hurlbert’s ability to practice his common calling is merely incidental.” *McBurney v. Young*, 667 F.3d 454, 465 (4th Cir. 2012) (internal citations omitted). The Fourth Circuit’s distinction between direct and indirect burdens on fundamental rights, however, finds no support in the Privileges and Immunities case law. Instead, the key issue is “the practical effect of the provision.” *Lunding*, 522 U.S. at 299. Where, as here, the law has an actual discriminatory effect on the ability of nonresidents to pursue a common calling, the State bears a substantial burden to justify that disparate treatment. Indeed, a rule that depended on distinguishing between direct and indirect effects would encourage states to pass laws designed as subterfuges, where the burden on noncitizens was the true purpose but was achieved indirectly to disguise that purpose—a result against which this Court has warned in a variety of constitutional contexts. *See, e.g., Hunter v. Erickson*, 393 U.S. 385, 391 (1969) (equal protection); *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 201 (1994) (“The commerce clause forbids discrimination, whether forthright or ingenious.”).

The Virginia law’s disparate treatment of citizens and noncitizens also runs afoul of the dormant Com-



merce Clause, which is analytically distinct from the Privileges and Immunities clause but addresses the same core problems. Restricting access to public records is precisely the kind of “economic barrier” that “plainly discriminates against interstate commerce,” because state residents in industries or professions that rely on public records enjoy a distinct advantage over their out-of-state counterparts. *See Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 (1951). As this Court has held, “where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected.” *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). Such legislation—like the citizens-only restriction at issue here—can survive only if it serves a legitimate local purpose that could not be equally achieved by available nondiscriminatory means. *See Maine v. Taylor*, 477 U.S. 131, 138 (1986). As the open government laws of the vast majority of states show, there is a clear “nondiscriminatory means” of providing access to public records—permitting access regardless of state citizenship and distributing the costs of access equitably among all requesters.<sup>8</sup>

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<sup>8</sup> *See, e.g.*, Cal. Gov’t Code § 6253; Colo. Rev. Stat. Ann. § 24-72-201; Conn. Gen. Stat. Ann. § 1-210; D.C. Code § 2-532; Fla. Stat. Ann. § 119.01; Haw. Rev. Stat. § 92F-11 (West); Idaho Code Ann. § 9-338; Ill. Stat. ch. 5 § 140/3; Ind. Code Ann. § 5-14-3-3; Iowa Code Ann. § 22.2; Kan. Stat. Ann. § 45-218; Ky. Rev. Stat. Ann. § 61.872; La. Rev. Stat. Ann. § 44:31; Me. Rev. Stat. tit. 1, § 408; Mass. Gen. Laws Ann. ch. 66, § 10; Miss. Code. Ann. § 25-61-5; *State ex rel. Bd. of Pub. Utils. of Springfield v. Crow*, 592 S.W.2d 285, 289 (Mo. Ct. App. 1979); Mont. Const art. II, § 9; Neb. Rev. Stat. § 84-712; Nev. Rev. Stat. Ann. § 239.010; N.M. Stat. Ann. § 14-2-1; N.Y. Pub. Off. Law § 84; N.C. Gen. Stat. Ann. § 132-6; Ohio Rev. Code Ann. § 149.43; Or. Rev. Stat. Ann. § 192.420; 65 Pa. Stat. Ann. §§ 67.102, 67.301 *et al.*; 2012 R.I. Laws Ch. 12-448 (12-H



## B. Right To Reside And Purchase Property In Other States

The rights to “pass through or to reside in any other state for the purposes of trade, agriculture, professional pursuits or otherwise” and “to acquire and possess property of every kind” are two of the oldest privileges and immunities recognized under the Clause. *Blake v. McClung*, 172 U.S. 239, 249 (1898) (internal quotation marks omitted); *see also Hicklin*, 437 U.S. at 524, 525. These rights are all the more important in today’s highly mobile society in which individuals often move from one state to another for employment, education, and other reasons. Yet Virginia’s citizens-only provision infringes on these rights in numerous ways. A few examples illustrate the harm.

When a person plans to move to another state, state and local records provide key information on where to reside and purchase property. For instance, a family relocating from California to Roanoke may want to look at the city’s planning documents to determine the potential land use around a new neighborhood development. A newly minted doctor, deciding where in the United States to set up her practice, may want to review state nursing home inspection records. An out-of-state owner of a restaurant franchise may need to look at state health inspection records.

Similarly, state and local records are vitally important to out-of-state purchasers of real property. *See*

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7555A); S.C. Code Ann. § 30-4-30; S.D. Codified Laws § 1-27-1; *City of Garland v. Public Util. Comm’n of Texas*, 165 S.W.3d 814, 820 (Tex. App. 2005); Utah Code Ann. § 63G-2-201; Vt. Stat. Ann. tit. 1, § 316; Wash. Rev. Code Ann. § 42.56.080; W. Va. Code Ann. § 29B-1-3; Wis. Stat. Ann. § 19.35; Wyo. Stat. Ann. § 16-4-203.

*Hicklin*, 437 U.S. at 524. Hurlbert himself is the proprietor of a real-estate tax assessment business and needed Virginia property records for his clients. *McBurney*, 667 F.3d at 460. Similarly, where a developer is considering a purchase of a tract of land, he needs access to local zoning records, historical property sales records, and other public records. Nearly all purchasers of real property must run title searches to ensure that the property is free from encumbrances. Without any substantial justification, the Virginia FOIA discriminates against non-residents in these circumstances.

These effects can be acute for people residing close to state lines. Consider metropolitan Washington, D.C., for example, in which residents of the District of Columbia or Maryland may work or own property in the northern Virginia suburbs or areas such as Shenandoah Valley. Such individuals are particularly likely to have need of access to public records in Virginia but face discrimination due to where they live.

### C. Right To Participate In Political Advocacy

This Court explained in *Piper* that it “has never held that the Privileges and Immunities Clause protects only economic interests.” 470 U.S. at 281 n.11. “It is discrimination against out-of-state residents on matters of fundamental concern which triggers the Clause, not regulation affecting interstate commerce.” *United Bldg. & Constr. Trades Council v. Mayor & Council of Camden*, 465 U.S. 208, 220 (1984). The Third Circuit in *Lee*, reviewing this Court’s Privileges and Immunities precedents, concluded that the Clause protects “political advocacy regarding matters of national interest or interests common between the states.” *Lee*, 458 F.3d at 200.

State and local records bear on a variety of issues of national importance, including oversight of political leaders, campaign finance, crime, health trends, and education. Many of the undersigned *amici* have used state freedom of information laws to access information concerning these important issues.

For example, Citizens for Responsibility and Ethics, with its only office located in Washington, D.C., requests documents under state open records laws to investigate potential unethical behavior by political leaders.<sup>9</sup> CREW has requested documents relating to the earmarking of millions of dollars by a Congressional representative for the Florida community college where his wife works; records relating to a concert that was scheduled at the University of Central Florida Arena that formed the basis for a complaint to the FTC alleging unfair and deceptive acts and practices; and documents relating to a Wisconsin governor's practice of sending State Troopers to follow state legislators.

The Electronic Privacy Information Center ("EPIC") has used state records to monitor both state and federal government activities, bringing to light controversial practices of national significance. EPIC's investigation of the Virginia Fusion Intelligence Center is a case in point. The Virginia Fusion Center compiles large amounts of data about citizens from public and private sources and raises substantial privacy con-

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<sup>9</sup> See Citizens for Responsibility and Ethics in Washington, *Legal Filings—FOIA Requests*, <http://www.citizensforethics.org/legal-filings/c/foia-requests2> (last visited Dec. 18, 2012).

cerns.<sup>10</sup> Remarkably, in 2008, Virginia enacted legislation exempting the state Fusion Center from state open records and privacy laws.<sup>11</sup> After state officials made statements hinting that federal agencies promoted this legislation as a condition of federal support for the program, EPIC filed Virginia FOIA requests for pertinent correspondence between the State Police and federal authorities, including the Department of Homeland Security and the FBI.<sup>12</sup> The State Police withheld the documents, and EPIC successfully challenged the withholding in court. *Electronic Privacy Info. Ctr. v. Capt. J. Thomas Martin. et al.*, No. GV08-019225 (Va. Dist Ct. May 8, 2008). EPIC's efforts unveiled a Memorandum of Understanding between the State Police and the FBI in which the entities committed to limit public oversight of the state Fusion Center.<sup>13</sup>

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<sup>10</sup> See EPIC, *EPIC v. Virginia Department of State Police: Fusion Center Secrecy Bill*, [http://epic.org/privacy/virginia\\_fusion/](http://epic.org/privacy/virginia_fusion/) (last visited Dec. 18, 2012).

<sup>11</sup> Citron & Pasquale, *Network Accountability for the Domestic Intelligence Apparatus*, 62 *Hastings L.J.* 1441, 1465 (2011), available at [http://www.hastingslawjournal.org/wp-content/uploads/2011/08/CitronPasquale\\_62-HLJ-1441.pdf](http://www.hastingslawjournal.org/wp-content/uploads/2011/08/CitronPasquale_62-HLJ-1441.pdf).

<sup>12</sup> EPIC, Freedom of Information Act request to Virginia State Police (Feb. 12, 2008), available at [http://epic.org/privacy/fusion/VA\\_FOIA021208.pdf](http://epic.org/privacy/fusion/VA_FOIA021208.pdf).

<sup>13</sup> *Memorandum of Understanding Between the Federal Bureau of Investigation and the Virginia Fusion Center* (2008), [http://epic.org/privacy/virginia\\_fusion/MOU.pdf](http://epic.org/privacy/virginia_fusion/MOU.pdf) ("To the extent information received as a result of this MOU is the subject of or is responsive to a request for information under the Freedom of Information Act, the Privacy Act, or a Congressional inquiry, such disclosure may only be made after consultation with the FBI.").

EPIC relied on a Virginia-resident attorney and its status as a media organization to pursue its freedom of information request and to challenge the State Police's denial under state law. An out-of-state requestor without these advantages would have been denied access to these state records or would have had to hire a Virginian to act on its behalf.

Government records capable of shedding light on issues of national importance are often maintained at state and local levels. Closing these records off to citizens of other states jeopardizes "the vitality of the Nation as a single entity." *Baldwin*, 436 U.S. at 383. The Virginia FOIA burdens noncitizens' right to "political advocacy" and to a resource "necessary to the ability to engage in that activity"—public records. *Lee*, 458 F.3d at 200.

\* \* \*

As described above, citizens-only restrictions in freedom of information laws cause myriad harms. Virginia cannot justify these burdens. There is no "substantial reason for the difference in treatment" to noncitizens. *Barnard v. Thorstenn*, 489 U.S. 546, 552 (1989); see also *A&C Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 392 (1994) (holding that a state discriminating against interstate commerce must show "that it has no other means to advance a legitimate local interest"). Fees can be imposed equally on all requesters to compensate for resources spent responding to requests. See *Barnard*, 489 U.S. at 556 (holding that a discriminatory attorney residency requirement was not justified by avoiding administrative burdens because "[t]here is no reason to believe that the additional moneys received from nonresident members will not be adequate to pay for any additional administrative bur-



den.”). Indeed, as stated at a meeting of the Virginia Freedom of Information Advisory Council, “[f]orty-four states do not restrict who may make FOIA requests and there has been no clamoring for changing the law in those states.”<sup>14</sup>

## II. INCONSISTENT ENFORCEMENT OF CITIZENS-ONLY PROVISIONS AND LACK OF OVERSIGHT COMPOUND THE HARM

States do not uniformly enforce citizens-only provisions in open records laws, and the lack of clear guidelines for noncitizen requesters and records custodians compounds the harm. Noncitizens do not know what rights they have and what procedures they must follow to request records. Records custodians undermine the purpose of open records laws by deciding whether to grant a request from a non-citizen based on its nature and source. This state of affairs magnifies the discrimination that noncitizens confront in attempting to obtain the same information that citizens may readily access.

Virginia agencies grant or deny noncitizen requests according to their own informal policies and whims. *See* Va. Freedom of Information Advisory Council, *supra* n.14, at 5-6. The attorneys general for Arkansas and Tennessee, which also have citizens-only provisions,<sup>15</sup> have likewise interpreted those laws as leaving the de-

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<sup>14</sup> Va. Freedom of Information Advisory Council, *Report to the Government and the General Assembly of Virginia* 5-6 (2010), available at <http://leg2.state.va.us/dls/h&sdocs.nsf/6f70d2f6f7bfeb2785256ebe0069ba89/dfd23a3c0ba5fd4c8525769a007a2cef?OpenDocument>.

<sup>15</sup> *See* Ark. Code. Ann. § 25-19-105(a)(1)(A); Tenn. Code Ann. § 10-7-503(a)(2)(A).

cision whether to grant noncitizens' requests for records to the whim of records custodians.<sup>16</sup> The arbitrary treatment of noncitizen requests may be magnified due to questions regarding the laws' constitutionality. See Letter from Dustin McDaniel, *supra* n.16 (“[A] custodian might reasonably decide to grant the [noncitizen’s] FOIA request in light of the Third Circuit decision.”).

Because the open government laws of Virginia, Arkansas, and Tennessee do not authorize noncitizen requests for records, their procedural safeguards would appear to govern only in-state requests. Such is the case in Virginia, where state and local agencies have developed inconsistent and arbitrary practices regarding how much to charge an out-of-state requester, how long to take in responding, and whether to honor the request at all. See Va. Freedom of Information Advisory Council, *supra* n.14, at 5-6. For example, some agencies “usually” honor out-of-state requests, and one processes such requests “unless the requested records are voluminous.” *Id.* at 6. The Virginia Freedom of Information Advisory Council’s report also notes that “state agencies do better with out-of-state requests than local agencies.” *Id.*

Because the Virginia FOIA does not apply to out-of-state requests, agencies may act arbitrarily or contrary to the purposes of open government laws without consequence. For example, state and local agencies

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<sup>16</sup> See Letter from Dustin McDaniel, Attorney Gen., Ark., to Billy D. Vanlandingham, Office of Pers. Mgmt., Ark. Dep’t of Fin. and Admin. et al. (Feb. 10, 2012), *available at* <http://ag.arkansas.gov/opinions/docs/2012-017.html>; Tenn. Att’y Gen. Op. No. 01-132 (Aug. 22, 2001), *available at* <http://www.tn.gov/attorneygeneral/op/2001/op132.pdf>.

need not adhere to the Virginia Supreme Court's holding that the "purpose or motivation behind a [FOIA] request is irrelevant" to the decision whether to grant it. *Associated Tax Serv., Inc. v. Fitzpatrick*, 372 S.E.2d 625, 629 (Va. 1988). The upshot is that out-of-state requesters may be given a lower priority, the reason for their requests may be factored into the processing, and, of course, their requests may not be processed at all. Unclear guidelines for out-of-state requesters produce inconsistent application of the state's open government law and unnecessarily burden, without substantial justification, many who seek access to public records.

### CONCLUSION

For the foregoing reasons, *amici* urge the Court to reverse the judgment of the court of appeals and hold that citizen-only restrictions in state open records laws are unconstitutional.

Respectfully submitted.

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**AMICUS  
CURIAE  
BRIEF**

JAN - 2 2013

OFFICE OF THE CLERK

No.12-17

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In The Supreme Court of the United States

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MARK J. MCBURNEY, *et al.*,  
*Petitioners,*

v.

NATHANIEL L. YOUNG, Deputy Commissioner  
and Director, Virginia Division of Child  
Support Enforcement, *et al.*,  
*Respondents.*

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On Writ of Certiorari to the United States  
Court of Appeals for the Fourth Circuit

**BRIEF OF THE COALITION FOR SENSIBLE PUBLIC RECORDS ACCESS; CONSUMER DATA INDUSTRY ASSOCIATION; CORELOGIC; LPS ANALYTICS, LLC.; REED ELSEVIER INC.; NATIONAL ASSOCIATION OF PROFESSIONAL BACKGROUND SCREENERS; THE SOFTWARE & INFORMATION INDUSTRY ASSOCIATION; NATIONAL CREDIT REPORTING ASSOCIATION; NATIONAL MULTIFAMILY RESIDENT INFORMATION COUNCIL; AND R.L. POLK & CO. AS AMICI CURIAE IN SUPPORT OF PETITIONERS**

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## IDENTITY OF THE *AMICI*<sup>1</sup>

*Amici* or their members (collectively, "*amici*") aggregate, index, and supplement public record information produced and maintained by state and local governments. They make that information available to businesses, governments and individuals who use it for important commercial, public and individual purposes. The value that *amici* add distinguishes *amici's* products and services from the public records available directly from governmental agencies. These enhancements enable individuals, public authorities, businesses, news agencies and consumers to obtain vital information that cannot practically be obtained in any other way. The *amici* are:

- The Coalition for Sensible Public Records Access (CSPRA) is a nonprofit organization dedicated to promoting open public records access for consumers and businesses.

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<sup>1</sup> All parties consent to the filing of this brief, and consent to its filing has been lodged with the Clerk. No counsel for a party wrote this brief in whole or in part and neither a party nor counsel for a party has made a monetary contribution intended to fund its submission.

- **The Consumer Data Industry Association (CDIA)** represents some 200 consumer data companies that engage in credit reporting, mortgage reporting, check verification, fraud prevention, risk management, employment reporting, tenant screening and collection services. These companies rely on public records acquired under state public records laws.
- **CoreLogic** provides financial and property information, analytics and services to real estate and mortgage finance, insurance, capital markets and government customers. Its databases include over 700 million records across 40 years including detailed property records, consumer credit, tenancy, and hazard and risk location information.
- **LPS Applied Analytics, LLC**, a Delaware corporation, uses state public record information to help its customers evaluate mortgage performance, understand real estate data and marketplace behavior, analyze portfolios and accurately value property. Its offerings allow professionals throughout the United States to proactively identify risk, create mitigation strategies and properly estimate collateral value.

- **Reed Elsevier Inc.'s LexisNexis** division provides access to the public records of all fifty states. These records include property title records, liens, tax assessor records, criminal history information, and other information kept by state governments. LexisNexis uses this information to create tools that combat identity theft, screen employees and prevent fraud, and assist law enforcement.
- **The National Association of Professional Background Screeners' (NAPBS)** membership consists of over 700 employment and tenant background screening firms that search publicly available state criminal background information to provide employers and the managers of apartment buildings in every state with accurate information about the people they employ and to whom they let space.
- **The Software & Information Industry Association (SIIA)** represents approximately 600 member companies, among them publishers of software and information products, including databases, enterprise and consumer software, and other products that combine information with digital technology. Many of its members rely on access to public records.

- **The National Credit Reporting Association (NCRA)** is a national trade organization of consumer reporting agencies and associated professionals that provide products and services to credit grantors, employers, landlords and all types of general businesses. NCRA's membership includes four of five mortgage credit reporting agencies in the United States that can produce a credit report meeting Fannie Mae, Freddie Mac and HUD requirements for mortgage lending.
- **The National Multifamily Resident Information Council (NMRIC)** is a not-for-profit association of resident screening companies that rely on access to public records from all states to provide qualifying background information on people seeking housing, a significant percentage of whom have backgrounds in multiple states.
- **R.L. Polk & Co.** specializes in providing information for the automotive and related industries, and relies on information supplied by state governments under their public records laws and other statutes. It uses this information to help customers understand their market position, identify trends, build brand loyalty, and ensure consumer safety. Its CARFAX Vehicle History Reports are routinely used by millions of consumers each year, and are available on all used cars and light trucks built after 1980.

## SUMMARY OF ARGUMENT

*Amici* are entities or associations of entities and individuals (collectively, “*amici*”) that rely on nondiscriminatory access to public records. They supply information to homebuyers, government agencies, manufacturers, lenders, journalists, and other members of the public at large for a variety of public and commercial purposes. Virginia’s Freedom of Information Act denies *amici* access to public records based on the fact that they are not citizens of the Commonwealth, while permitting unencumbered access to their in-state counterparts. *Amici* agree with the petitioner that the statute violates the Privileges and Immunities Clause. *Amici*, who are out-of-state corporations, write to emphasize the harm that Virginia’s public records law inflicts on interstate commerce. Under the precedents of this court, that discrimination is unconstitutional.

*First*, Virginia’s statute facially discriminates against interstate commerce, and must therefore advance a legitimate government interest in the absence of nondiscriminatory alternatives. The plain text of the statute directly places a burden on out-of-state public records aggregators that similar in-state businesses do not have to bear, and its bar to noncitizen access discriminates against the interstate communication of valuable commercial information. Like the drivers’ information requested from the government in *Condon v. Reno*, the various types of



public record information relied upon by *amici*—including drivers' information, criminal records, real estate filings, and commercial securitizations, are also articles of interstate commerce. The state's suggestion that the market participant doctrine shields the statute from searching review is unavailing, as only the state may create these records: they are a natural monopoly. The state cannot therefore be considered a "participant" in the market—it both creates that market and regulates it. The full force of Commerce Clause scrutiny applies.

Virginia's statute cannot survive that scrutiny. The sole interest advanced by the state to support the constitutionality of its law is that it wishes to inform Virginia's citizenry. Virginia offers no credible reason why, for example, in-state credit bureaus and background screeners inform Virginia citizens, and out-of-state ones do not. None exists. If informing citizens really is the goal of the public records law, the state has a ready alternative: eliminate its citizen-based discrimination and allow every citizen access to these records.

*Second*, statutes like Virginia's will atomize a thriving national information ecosystem. Nondiscriminatory access to public records is both an assumption and indispensable element of the marketplace in which *amici* operate. Virginia's suggestions that companies such as *amici* hire in-state agents or send representatives to visit the state is infeasible

for small businesses, and destroys economies of scale for larger ones. The resulting gaps in valuable national databases and information services will harm many beneficial commercial and government activities, including law enforcement, criminal background screening, tax collection, fraud detection, and the provision of consumer credit.

## ARGUMENT

### I. VIRGINIA'S DISCRIMINATION AGAINST NONCITIZENS IS UNCONSTITUTIONAL

Section 2.2-3704 of the Virginia Freedom of Information Act (VFOIA) provides legal access to all citizens of Virginia. It denies that access to all non-citizens except (1) representatives of non-Virginia newspapers and magazines that circulate their publications in Virginia, and (2) representatives of television and radio stations that broadcast into Virginia.<sup>2</sup> Va. Code Ann. § 2.2-3704(A).

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<sup>2</sup> The statute provides:

Except as otherwise specifically provided by law, all public records shall be open to inspection and copying by any citizens of the Commonwealth during the regular office hours of the custodian of such records. Access to such records shall not be denied to citizens of the Commonwealth, representatives of newspapers and magazines with circulation in the Commonwealth, and representatives of radio and television stations broadcasting in or into the Commonwealth. The custodian may require the requester to provide his name and legal address. The custodian of such records shall take all

The Fourth Circuit has upheld Virginia's statute against challenges based on Article IV's Privileges and Immunities Clause and the Commerce Clauses of the Constitution. *McBurney v. Young*, 667 F.3d 454 (4th Cir. 2012). *Amici* agree with Petitioners' contention that VFOLA's facial discrimination against noncitizens violates the Privileges and Immunities Clause of Article IV. (See Pet. Br. Parts III, IV.) As petitioners explain, that Clause prohibits a state from affording access to the state's public records to its own citizens, while denying that privilege to individuals who are citizens of other states. (See *id.*)

Virginia's statute, however, applies to corporations as well as to individuals, and corporations enjoy no protection under that Clause. *Paul v. Virginia*, 75 U.S. (7 Wall.) 168, 178 (1869). A decision of this Court striking down the Virginia statute as a violation of the Privileges and Immunities Clause alone leaves states free to attempt to bar out-of-state corporations from access to Virginia public records while affording that access to Virginia corporations.

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necessary precautions for their preservation  
and safekeeping.

Va. Code Ann. § 2.2-3704(A). Once acquired, Virginia Public Records Act does not place restrictions on the information's dissemination.

Such discrimination against out-of-state corporations, while it may not violate Article IV's Privileges and Immunities Clause, clearly violates this Court's dormant Commerce Clause jurisprudence. *See, e.g., Or. Waste Sys., Inc. v. Dep't of Env'tl. Quality*, 511 U.S. 93, 99 (1994).

## II. SECTION 2.2-3704 OF VIRGINIA'S FREEDOM OF INFORMATION ACT VIOLATES THE COMMERCE CLAUSE.

The Fourth Circuit rejected petitioners' argument that Virginia's facial discrimination against out-of-state corporations violated interstate commerce on the basis of its conclusion that the statute's effect on interstate commerce was merely "incidental." *McBurney*, 667 F.3d at 469.

That conclusion was incorrect. Access to commercial aggregation and dissemination of public records by *amici* and similar companies is not "incidental" to interstate commerce: it is interstate commerce. VFOIA's facial discrimination against that commerce cannot survive dormant Commerce Clause scrutiny unless the discrimination can be shown by Virginia to be necessary in order to serve legitimate state interests. *See Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 353 (1977). Virginia cannot meet that standard, and has never seriously attempted to argue that it can.



**A. Virginia's Statute on its Face  
Discriminates Against Interstate  
Commerce.**

On its face, VFOIA requires "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Or. Waste Sys.*, 511 U.S. at 99. See also *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 274 (1988). This Court has "generally struck down [such statutes] without further inquiry." *Granholm v. Heald*, 544 U.S. 460, 487 (2005) (quoting *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986)). "Thus, where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected." *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). Virginia's statute discriminates against interstate commerce in at least two important (and unconstitutional) ways.

First, and most obviously, it discriminates against out-of-state individuals and entities, like *amici*, whose business includes gathering and communicating information contained in Virginia's public records, and in favor of Virginia citizens who engage in the same business. Petitioner Hurlbert is, for example, a citizen of California. As described in the Fourth Circuit opinion, he is engaged "in the business of requesting real estate tax assessment records for his clients from state agencies across the

United States, including Virginia." *McBurney*, 667 F.3d at 460. His request was "denied on the ground that he was not a citizen of the Commonwealth." *Id.*

If a Virginia citizen engaged in the same business had requested the same records for the same client, the request would have been granted. Under VFOIA, that in-state business would acquire information directly from the state at the cost of reproduction and search. *See* Va. Code Ann. § 2.2-3704 (F); *see also id.* § 2.2-3704 (G) (describing same procedure for databases and other electronic records).<sup>3</sup> Unlike in-state corporations, out-of-state corpora-

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<sup>3</sup> This is a commonplace aspect of public records laws. *See, e.g.*, Cal. Gov't Code § 6253(b) ("payment of fees covering direct costs of duplication, or a statutory fee if applicable."); Del. Code Ann. tit. 29 § 10003(a) ("[a]ny reasonable expense"); Fla. Stat. § 119.07(1) (actual costs of duplication unless authorized by law, i.e., when extensive use of information technology resources is required); 5 Ill. Comp. Stat. 140/6 (ability to charge reproduction costs but not search fees unless the requestor is a commercial entity); N.Y. Pub. Off. § 87(1) (setting forth maximum fees and the approved calculation methods); N.C. Gen. Stat. § 132-6.2(b) (requiring public records to be made available for free or at "actual cost"); 51 Okla. Stat. tit. 51 § 24A.5.3 (only the reasonable, direct costs of copying); Tenn. Code Ann. § 10-7-507 (reasonable fee per copy to defray the production costs); Tex. Gov't Code Ann. § 552.261 ("[t]he charge for providing a copy of public information shall be an amount that reasonably includes all costs related to reproducing the public information, including costs of materials, labor, and overhead.").

tions must find some other way to access public records, and bear the cost of doing so. Small and startup businesses that cannot afford information brokers often use direct access to public records for market research and product development. In a highly competitive industry, such differences may be determinative. Indeed, *Amicus* NCRA is aware of only *one* Virginia entity that Fannie Mae and Freddie Mac recognize as meeting their underwriting standards in the production of credit reports; all of its out-of-state members must find other ways to side-step Virginia's citizenship ban.<sup>4</sup> Such an imposition on out-of-state commercial interests of a prohibition not imposed on in-state businesses "falls squarely within the area that the Commerce Clause puts off limits to state regulation." *Philadelphia*, 437 U.S. at 628.

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<sup>4</sup> See *Credit Information Providers*, Fannie Mae, [https://www.fanniemae.com/content/datagrid/credit\\_provider/cp\\_sortbyname.html](https://www.fanniemae.com/content/datagrid/credit_provider/cp_sortbyname.html) (last visited Dec. 18, 2012) (indicating one approved entity in VA with two separate sponsors). See generally Fannie Mae, *Selling Guide: Fannie Mae Single Family* 438-46 (2012) (explaining the requirements, types, and accuracies that agencies must provide in credit reports), available at <http://documents.efanniemae.com/sf/guides/ssg/sg/pdf/sel100212.pdf>. Similar entities (eighty percent of which are *amicus* NCRA members) now lack legal access to public records affecting Virginia consumers, and will now have to purchase that information from Virginia firms.

The second way in which Virginia's statute discriminates against interstate commerce is its facial discrimination against the interstate communication of commercially valuable information. The release and dissemination of such information from state governments is interstate commerce. See *Condon v. Reno*, 528 U.S. 141, 148 (2000) (finding that motor vehicle information held and released by the states and regulated by the Drivers Privacy Protection Act, 18 U.S.C. §§ 2721–2725, constitutes articles of commerce). As *Condon* explains, all kinds of public records are “used by insurers, manufacturers, direct marketers, and others,” see *id.*, as well as law enforcement agencies, taxing authorities, lenders, and any business that needs information from public records to operate or grow.

Commercial activities in the United States have come to depend heavily on the interstate communication of government information. *Amici's* interstate databases and services are a predictable and desirable result of that commerce, relied on by employers, businesses, and government entities. Having made valuable public record information available, Virginia may not impose burdens on the interstate, but not the intrastate, communication of that information without a demonstrated necessity to do so. As we explain below, the burdens imposed by VFOIA on the free communication of commercially valuable information are substantial and in many respects, prohibitive.

## **B. Virginia's Discrimination is not Protected by the Market Participant Doctrine**

In its prior filings, Virginia argued that just like "Lexis," or any other market participant, it "may refuse to deal with any particular person who wishes to gain access to the information held by those companies." (Joint Response Brief at 49, *McBurney v. Young*, 667 F.3d 454 (4th Cir. 2012) (No.11-1099) (relying on *Chance Mgmt., Inc. v. South Dakota*, 97 F.3d 1107, 1111 (8th Cir. 1996))); *see also Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 810 (1976) ("Nothing in the purposes animating the Commerce Clause prohibits a State . . . from participating in the market and exercising the right to favor its own citizens over others")(footnotes omitted); (*see also* Cert. Opp'n Br. 25-28 (arguing that the citizen limitation is market participation and not market regulation).) The market participant doctrine, however, does not apply to Virginia's activities.

While a state may participate in a market and have its actions remain outside the realm of Commerce Clause scrutiny, that immunity does not apply when the state acts as regulator: the State may not "impose conditions, whether by statute, regulation, or contract, that have a substantial regulatory effect outside of that particular market." *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 97 (1984). "The limit of the market participant doctrine



must be that it allows a State to impose burdens on commerce within the market in which it is a participant, but allows it to go no further." *Id.* Virginia's actions run well afield of the market participant doctrine's narrow boundaries.

First, when it compiles and releases public records, the state is not a commercial actor: the statute prohibits the state from turning a profit. Va. Code Ann. § 2.2-3704(F). Virginia does not "participate" in a market any more than a court does when it charges filing fees or recovers other administrative costs.

Second, Virginia has a natural monopoly on its public records: there can be only one document or database of record for official and legally significant facts and filings. A private party that creates its own Virginia cement plant is participating in the market; one that manufactures its own Virginia real estate deed is committing a forgery.

Third, when the state creates public records and attaches significance to them, it performs a legislative function, not a private one. The reasons for making many records public are the same as the reasons for publishing statutes—(1) to prescribe legal rights and duties; and (2) to provide people with constructive notice of their contents.

For example, the recorded real estate documents at issue in this case exist to inform third par-

ties that the person named in the deed owns Blackacre, and under what terms.<sup>5</sup> Under Virginia law (and the law of other states), the facts found in a recorded real estate document are presumed to be true, and subsequent purchasers are bound by those documents.<sup>6</sup> Constructive notice forms the assumption of the real estate recording system and other le-

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<sup>5</sup> See generally D. Barlow Burke, *Law of Title Insurance* § 5.01 [C] (3d ed. 2000 & Supp. 2004) (describing the manner and extent to which title insurance policies rely on presumptions of notice in determining coverage of public record); William Caldwell Niblack, *Abstracters of Title* 77 (1908) (describing how the United States developed a system of recording designed to impart constructive notice to “all the world.”).

<sup>6</sup> See, e.g., *Shaheen v. County of Mathews*, 579 S.E.2d 162, 165 (Va. 2003) (holding that purchasers have constructive notice in their chain of title regarding easement providing access to public landing and road, and because they implicitly agreed to a 1959 description of the landing); *Chavis v. Gibbs*, 94 S.E.2d 195, 197 (Va. 1956) (documents in chain of title provide constructive notice); see also, e.g., Cal. Civil Code § 1213 (statutory presumption of constructive notice); Ohio Rev. Code Ann. §§ 5310.02-5310.03 (providing, respectively, that recorded documents determine priority of claims and shall be conclusive proof of facts stated therein if title is acquired in good faith); *Cuthrell v. Camden Cnty.*, 118 S.E.2d 601, 604 (N.C. 1961) (describing purchaser’s duty to examine title record); *Equity Bank, SSB v. Chapel of Praise A.L.D.C.M., Inc.*, No. 06-0460-CG-B, 2007 U.S. Dist. LEXIS 56086, at \*13-\*14 (S.D. Ala. July 31, 2007) (noting that Alabama law imparts constructive notice of real estate records to purchasers).

gal systems that incorporate publicly accessible documents. The trustee in bankruptcy is just as bound by real estate filings as are any of a multitude of creditors that may seek to thwart an avoidance. See *Tyler v. Ownit Mortg. Loan Trust (In re Carrillo)*, 431 B.R. 692, 697 (Bankr. E.D. Va. 2010) (creditors and trustee on constructive notice of filing contents).

Similarly, by adopting a notice filing system, Article 9 of the Uniform Commercial Code relies on public records to inform the public of claims made in a particular transaction. See Va. Code Ann. § 8-9A-502 (comment 2) (adopting system of notice filing). Article 9 assumes nondiscriminatory interstate access to public records; it would make no sense to require an out-of-state creditor to refile notice of its security interest in a new jurisdiction when a debtor relocates, and then deny other out-of-state creditors the right to access that filing. See Va. Code Ann. § 8-9A-316.<sup>7</sup> Indeed, Virginia's own courts acknowledge that the function of these filings is to protect the in-

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<sup>7</sup> Other provisions of the Uniform Commercial Code contain a tacit assumption that secured transactions will cross state lines. See, e.g., Va. Code Ann. § 8-9A-301 (requiring local law of jurisdiction to govern legal status of security interest except in cases of possessory interest in collateral (when law of other jurisdiction applies)); id. § 8-9A-324 (comment 4) (requiring notice to the holder of conflicting security interest in inventory no matter where that person might reside).

terests of third parties, who could be located anywhere.<sup>8</sup> Setting a nonresident third party's property and other rights by these documents without giving that nonresident party a right to access them offends basic notions of fairness and due process. *Cf. Bldg. Officials & Code Adm'r Int'l Inc. v. Code Tech Inc.*, 628 F.2d 730, 734-35 (1st Cir. 1980) (noting that if the law is generally available, "everyone may be considered to have constructive notice of it[.] . . . But if access to the law is limited, then the people will or may be unable to learn of its requirements and may be thereby deprived of the notice to which due process entitles them.").

### C. Nondiscriminatory Methods of Informing Virginia's Citizens Exist.

VFOIA's facial discrimination invokes the most demanding judicial review that the Commerce Clause provides. "Facial discrimination invokes the

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<sup>8</sup> See, e.g., *In re Holladay House, Inc.*, 387 B.R. 689, 694-695 (Bankr. E.D. Va. 2008) (describing purpose of article 9 filings) (citing *Hixon v. Credit Alliance Corp.*, 369 S.E.2d 169, 172 (Va. 1988)); *Phillips v. Ball & Hunt Enters.*, 933 F. Supp. 1290, 1295 (W.D. Va. 1996) (applying Uniform Commercial Code and finding Virginia, not Kentucky, state of perfection of filed security interest between West Virginia, Virginia, and Kentucky corporations).

strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives." *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979); see also *Hunt*, 432 U.S. at 353; see also *Limbach*, 486 U.S. at 278.

Virginia's statute cannot pass this test. The sole interest advanced by the state for discriminating against the petitioners in this case involves ensuring that its citizens are well-informed. See Va. Code Ann. § 2.2-3704(A). Giving non-citizens access to public records does not in any way interfere with this basic objective.

The state is not claiming (and cannot claim) that lawfully released public record information "creates contagion and other evils" that would warrant its embargo. *Philadelphia*, 437 U.S. at 629. *Amici's* activity advances Virginia's stated interest. They obtain public record information from other states, add value to that information, make it easily searchable, and then return that information back to Virginia citizens in its enhanced form. Like their in-state counterparts, *amici* inform Virginians and citizens nationwide of matters of importance, including potential fraud, the criminal history of a potential employee or the presence of a sex offender in a given community. If the state truly wishes to advance its



stated goal, all it needs to do is what the overwhelming majority of states do: make access to public records nondiscriminatory.<sup>9</sup>

### **III. AFFIRMANCE OF THE DECISION BELOW WILL DISRUPT THE NATIONAL MARKETPLACE FOR PRODUCTS AND SERVICES THAT DEPEND ON PUBLIC RECORD INFORMATION**

The business of gathering, publishing and interpreting public records has existed in some form since antebellum America, whether gathering judicial reports as state and federal courts released their opinions,<sup>10</sup> or through the collection of real estate title documents for the purpose of abstract prepara-

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<sup>9</sup> A handful of state statutes require citizenship to acquire access to public records. They are: Alabama – Ala. Code § 36-12-40; Arkansas Ark. Code Ann. § 25-19-105; Delaware Del. Code Ann. tit. 29, §10003; Missouri - Mo. Rev. Stat. § 109.180; New Hampshire - N.H. Rev. Stat. Ann. § 91-A:4; New Jersey – N.J. Stat. Ann. §47:1A-1; Tennessee - Tenn. Code Ann. § 10-7-503; Virginia - Va. Code Ann. § 2.2-3704(A).

<sup>10</sup> See generally Francine Biscardi, *The Historical Development of the Law Surrounding Judicial Report Publication*, 85 Law Libr. J. 531, 538-39 (1993) (summarizing the rise of the West Publishing Company and the collection of judicial decisions from state courts).

tion.<sup>11</sup> That activity serves a valuable purpose: "So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed." *Va. Pharmacy Bd. v. Va. Consumer Council*, 425 U.S. 743, 765 (1976). The collection, organization, and dissemination of government information by *amici* and similar entities have become essential to an informed public.

All fifty states and the District of Columbia have public records laws, and *amici* rely on those laws to ensure the comprehensiveness of their information-related services.<sup>12</sup> Virginia's citizen-only rule is antithetical to and disruptive of a national economic market in products and services depending on equal access to public record information, and undermines the democratization of information ac-

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<sup>11</sup> *Watson v. Muirhead*, 57 Pa. 161, 167-68 (1868) (describing obligations of conveyancer).

<sup>12</sup> See generally *Open Government Guide* (Gregg Leslie & Mark Caramanica eds., The Reporters Committee for the Freedom of the Press 6th ed. 2011), available at <http://www.rcfp.org/open-government-guide> (describing the public records laws of the fifty states and the District of Columbia).

cess that enables small information businesses to compete against larger providers.

**A. Compliance with the Fourth Circuit Decision Would Be Impossible for the *Amici*.**

The text of the statute makes compliance with VFOIA impossible for out-of-state entities. Virginia's inconsistency on this issue is particularly troubling. In its briefing in the Fourth Circuit, it suggests that VFOIA's citizenship restriction may be circumvented through the "minor inconvenience" of having to request a Virginian to obtain a public record.<sup>13</sup> (Joint Response Brief at 49, *McBurney*, 667 F.3d 454 (No.11-1099).) In its Opposition to the Petition for Certiorari, for the first time, Virginia suggested that one could comply with the statute by visiting the state in-person and personally inspecting the requested records. (See Cert. Opp'n Br. 23.)

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<sup>13</sup> Virginia claims that "[r]esponding to out-of-state FOIA requests frustrates these interests by consuming the time and resources that would otherwise be available for providing services to its own citizens." (Joint Response Brief at 41, *McBurney*, 667 F.3d 454 (No.11-1099).) *Amici* note that if all non-citizens hire a Virginia citizen to request public records, then the number of public record requests would not change: hiring a Virginia citizen does nothing to reduce the consumption of time or resources.

These suggestions are not feasible for a business in neighboring states, much less those on an opposite coast.

Even so, Virginia's suggestions are not well supported by the statute. The face of section 2.2-3704 restricts access to public records by out-of-state entities *except* for the representatives of designated media entities. The statute also requires those "representatives" to provide their legal names and addresses, suggesting that the legislature (1) intended it to apply only to individuals representing exempted entities; and (2) did not intend to exempt representatives of other kinds of businesses.

*Amici* are out-of-state corporations not covered by VFOIA's exemptions and cannot have "representatives" visit the state in-person to inspect the requested records. To make matters worse, Virginia's law provides no answer on how they are to become "citizens" of the state.<sup>14</sup> *Amici's* access to these

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<sup>14</sup> For example, the state might consider foreign corporations citizens if they register an agent or open an office in the way that they would be required to do if they "transacted business" in the state. See Va. Code Ann. § 13.1-759. Many *amici* will not be subject to this requirement, as their primary function will be to examine and deliver information across state lines. Cf. *Spector Motor Serv., Inc. v. O'Connor*, 340 U.S. 602, 607-08 (1951); see also *Tignor v. L.G. Balfour & Co.*, 62, 187 S.E. 468, 470 (Va. 1936) (cited in *Continental Props., Inc. v.*

records therefore depends entirely on the record custodian's whim. Virginia's alternative constructions of the statute still leave *amici* with the choice of acquiring information from a third party, or leaving information out of their services. Neither result is desirable.

### **1. The Use of Third Parties is Infeasible and Inefficient.**

For the *amici*, hiring in-state actors represents more than a "minor inconvenience." (Joint Response Brief at 46-47, *McBurney*, 667 F.3d 454 (No.11-1099).) For smaller entities, requiring them to fly across the country or hire individuals in every state is impractical and unaffordable. Moreover, such a requirement threatens standard processes that enable efficient nationwide operation. National financial institutions rely on *amici* like CoreLogic to provide a complete file of public real estate information such as tax assessments, mortgage deeds,

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*Ullman Co.*, 436 F. Supp. 538, 540 (E.D. Va. 1977)). In contrast, even if using a diversity standard, a corporation can only be a "citizen" of two states: that of incorporation and that where its "nerve center" is located, rendering compliance with even the handful of statutes like Virginia's impossible. *Hertz Corp. v. Friend*, 130 S. Ct. 1181, 1192 (2010).



assignments, and lien releases on properties nationwide.<sup>15</sup> The economies of scale in CoreLogic's standard and centralized acquisition processes permit its customers to gain access to relevant information in a timely and cost-effective manner. This rapid access minimizes the risk of a property's status changing between the initial information "snapshot" surrounding the contract of sale, and the final loan closing protecting a wide range of investors.

Requiring national entities to hire people in every state needlessly jeopardizes these standardized processes. First, the additional cost of hiring and training new employees would pass through to consumers, making the underlying transaction more expensive. *Cf. Lee v. Minner*, 458 F.3d 194, 200 (3d Cir. 2006) (rejecting state's argument that the burden of having to hire an agent is "insubstantial"). Second, the addition of an agent in every state would destroy the efficiencies and the gains in accuracy that standardized and centralized national collection of data enables. Third, any delays caused by fractured corporate citizenship requirements will lead to larger "gaps" between the period when assessment,

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<sup>15</sup> See, e.g., Real Estate, *About Us, Data*, CoreLogic, <http://www.corelogic.com/about-us/data.aspx#container-RealEstate> (last visited Dec. 18, 2012); Mortgage, *About Us, Data*, CoreLogic, <http://www.corelogic.com/about-us/data.aspx#container-Mortgage> (last visited Dec. 18, 2012).

title, and similar information is examined, and the time at which a real estate loan closes, during which new liens or other encumbrances may appear. See J. Alex Heroy, *Comment, Other People's Money: How a Time Gap in Credit Reporting May Lead to Fraud*, 12 N.C. Banking Inst. 321, 323 (2008). The resulting risk will be priced into the transactions, and will result in (a) higher costs to consumers; and (b) higher risks in certain types of mortgage-backed securities and other financial instruments. In individual cases, these risks may be small, but when those risks are aggregated over large numbers of transactions, significant harm and uncertainty will result.

### **B. Discriminatory Access to Public Records will Create Harmful Gaps in Multistate Publications**

*Amici* are involved in an enormous interstate market for public record information that depends on a large degree of interstate comity in order to function.<sup>16</sup> If that comity is destroyed by statutes

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<sup>16</sup> That comity is especially important given the large numbers of people who move each year. In 2008-09, for example, 6.9 million people moved from one state to another. U.S. Census Bureau, U.S. Dep't of Commerce, P20-565 *Geographical Mobility: 2008 to 2009* 9 (2011), available at <http://www.census.gov/prod/2011pubs/p20-565.pdf> Criminals are no different: in one examination of a Department of Justice program in which applicants for volunteer positions were sub-

like Virginia's, resulting gaps will appear in national collections of publicly available information. The value of, and benefits that flow, from *amici's* services will diminish dramatically if these gaps are allowed to develop. Examples of the activities that would be adversely affected include:

- **Law Enforcement.** LexisNexis databases have been used for years by the FBI, as well as state and local law enforcement offices. Access to these and similar information services "allows FBI investigative personnel to perform searches from computer workstations and eliminates the need to perform more time consuming manual searches of federal, state, and local records systems, libraries, and other information sources."<sup>17</sup>

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ject to background screening, it was revealed that over 40 percent of recidivists had committed a crime in a different state from the one in which they applied for a position, and over half of those with criminal histories lied about their existence when asked. S. 645, 112th Cong. § 2(10) (2012); see also *Talking Points: The Child Protection Improvements Act*, MENTOR (Sept. 2010), [http://www.mentoring.org/downloads/mentoring\\_1279.pdf](http://www.mentoring.org/downloads/mentoring_1279.pdf).

<sup>17</sup> *Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations for Fiscal Year 2000: Hearings on H.R. 2670/S.1217 Before Subcomm. for the Dep'ts of Commerce, Justice, and State, the Judiciary, and Related Agencies of the S. Comm. on Appropriations, 106th Cong.*

- **Tax Compliance.** Governments use real estate records like those at issue in this case to detect tax avoidance. For example, Delaware County, Indiana recovered \$1.5 million in revenue home-
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280 (1999). LexisNexis' relationship with the FBI continues to this day, and since 9/11, the comprehensiveness and utility of these information tools have become even more critical to law enforcement authorities. "[W]e often get more accurate data from the commercial sector. In addition, the processes by which government agencies manage data often makes it difficult to acquire and needs [a] great deal of labor intensity into making it usable and accessible to other entities." Privacy Office, Dep't of Homeland Sec., Official Workshop Transcript, *Privacy and Technology Workshop: Exploring Government Use of Commercial Data for Homeland Security*, Panel One: How are Government Agencies Using Commercial Data to Aid in Homeland Security? at 9 (Sept. 8-9, 2005) (transcription commas omitted) (comments of Grace Mastalli Principal Deputy Director for the Information Sharing and Collaboration Program at DHS), available at [http://www.au.af.mil/au/awc/awcgate/dhs/privacy\\_wkshop\\_panell1\\_sep05.pdf](http://www.au.af.mil/au/awc/awcgate/dhs/privacy_wkshop_panell1_sep05.pdf). That reliance extends to the states as well. See Brief of the State of Texas as *Amicus Curiae* in Support of Defendants at 2-3, *Taylor v. Acxiom Corp.*, 612 F.3d 325 (5th Cir. 2010) (Nos. 08-41083, 08-41180, 08-41232) (noting that the state "routinely uses national databases provided by private resellers to track down individuals who are delinquent in their child-support payments, as well as to help locate suspects in the course of conducting consumer protection and criminal investigations" and warning against eliminating a "valuable tool of law enforcement.").

stead exemption fraud.<sup>18</sup> An audit assisted by LexisNexis' electronic databases of public records revealed that owners claiming Indiana as a principal residence in fact were claiming multiple homestead exemptions across multiple states.<sup>19</sup>

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<sup>18</sup> Indiana law permits taxpayers certain deductions for their primary residence. See Ind. Code §§ 6-1.1-12-37(a)(1), -37(a)(2), -37(c) (describing deductions).

<sup>19</sup> Press Release, LexisNexis, LexisNexis and Tax Management Associates Identify Fraud and Discover Nearly \$1,500,000 in New Revenue for Delaware County, Indiana (Feb. 27, 2012), *available at* <http://www.lexisnexis.com/risk/newsevents/press-release.aspx?id=1330361634905478>. On the federal level, LexisNexis products are used by the United States Department of Health and Human Services, and their state government analogs to detect Medicare and Medicaid fraud by matching requests for payment against licensure records and other information acquired from public records.



- **Protection from Crime.** Members of *amicus* NAPBS acquire and aggregate public records from multiple jurisdictions for the purpose of performing criminal background checks. The use of this information helps employers and others ensure a “competent, reliable workforce.” *NASA v. Nelson*, 131 S. Ct. 746, 758 (2011). Those users include the federal government, which last year spent more than one billion dollars to screen more than two million employees in non-intelligence positions.<sup>20</sup>
- **Consumer Credit.** Many of *amicus* CDIA’s members acquire public records information for the purpose of evaluating consumer credit—whether for purchasing a car, opening a business, or determining a credit card interest rate. The prudence of a lending decision can depend on knowing what real estate the borrower holds, whether the borrower faces any tax liens, or if the borrower recently declared bankruptcy.

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<sup>20</sup> U.S. Gov’t Accountability Office, GAO-12-197, *Background Investigations: Office of Personnel Management Needs to Improve Transparency of Its Pricing and Seek Cost Savings* 1 (2012), available at <http://www.gao.gov/assets/590/588947.pdf>. As that report explains, many such checks have similar components, including a review of national criminal and public records databases by private entities with which the government has contracted for that purpose. See *id.* at 8, 44.

- **Product Safety.** Similarly, R.L. Polk & Co., the parent company of Carfax ([www.carfax.com](http://www.carfax.com)), provides a variety of automotive information to manufacturers and consumers that it obtains from state governments subject to the Driver's Privacy Protection Act of 1994, 18 U.S.C. § 2721 *et seq.*, as well as public records laws. Carfax uses that information to provide consumers and dealers with a vehicle's accident history, alerting both customers and dealers whether they are potentially buying a "lemon." R.L. Polk & Co. also combines title information with other state records to help manufacturers notify individual consumers in the event of a safety recall.

- **Fraud Prevention.** Interstate access to public records helps prevent harm from identity theft. For example, LexisNexis's Accurint service routinely provides records-based fraud prevention tools to financial and retail institutions. When authenticating a request to transfer funds from a bank account, a financial institution will attempt to authenticate the caller's identity by asking questions developed through use of public information that a wallet thief would not know. Examples include, "Which of the following five addresses is a past home address of yours?" or "Which of the following cars did you once own?" The answers to these questions could be found in state real property records or publicly available Uniform Commercial Code filings.

The ability of governments, consumers and others to successfully engage in these activities relies on the fullness and breadth of the information that *amici* and similar entities obtain from government agencies nationwide. When information from citizens-only states is excluded, individuals can obtain employment in situations where prudence and, occasionally, a statute dictate they should not—whether as a pedophile in a day care center, or as an

embezzler in an accounting firm.<sup>21</sup> Law enforcement officers will waste investigation time collecting information that *amici* once regularly made available. Consumers will not be notified about the manufacturing defect in their car's brakes. Tax cheats like those identified by Indiana will escape with their ill-gotten gains intact. And businesspeople will be unable or unwilling to enter transactions because of the unavailability of desired information.

Other uses include enforcing child support obligations. For example, the Association for Children for Enforcement of Support reports that public record information provided through commercial vendors helped locate over 75 percent of the "deadbeat

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<sup>21</sup> See, e.g., 7 U.S.C. § 2009cc-14 (barring people with fraud convictions from serving on boards of rural development companies without the written consent of the Secretary); N.Y. Tax § 480(3) (barring license to operate as director of tobacco wholesaler if convicted of certain offenses in New York or elsewhere); S.C. Code Ann. § 63-3-820 (barring appointment as guardian ad litem if convicted of fraud); Tex. Ins. Code § 801.151 *et seq.* (prohibiting licensure of insurance company if officer or board member has been convicted of fraud). Examples of this kind of statute abound. See generally ABA, *National Inventory of the Collateral Consequences of Conviction*, <http://www.abacollateralconsequences.org/> (last visited Dec. 18, 2012) (collecting state statutes that limit employment based on conviction).

parents" they sought.<sup>22</sup> Moreover, not all of the reasons for which amici provide access to public records are economic. A Maryland parent may wish to check Virginia criminal records to see if the day care center her child attends is employing any sex offenders or has been cited for child safety violations. A Virginia resident may wish to examine the government-issued health and safety reports of an assisted living facility in Florida before moving her parents there. A California citizen may wish to see if his employer supported a marriage-related ballot measure in Washington. And so on. All of these activities and others depend on the ability of *amici* and other similarly situated entities to access government information in states in which they are not "citizens," and all of these activities will suffer if the databases that *amici* utilize are incomplete.

Nondiscriminatory access to public records also undergirds important statutory regimes. Many *amici* compile reports on individual consumers for purposes of background screening and credit deci-

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<sup>22</sup> Comments of Gail H. Littlejohn, Vice President, Gov't Affairs, & Steven M. Emmert, Dir., Gov't Affairs, Reed Elsevier Inc., LEXIS-NEXIS Group (Mar. 31, 2000), available at <http://www.sec.gov/rules/proposed/s70600/littlejl.htm>; see also *Financial Information Privacy Act: Hearings on H.R. 4321 Before the H. Comm. on Banking and Financial Services*, 105th Cong. 100 (1998) (statement of Robert Glass).



sions. That activity is governed by the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681 *et seq.*, and its state analogs.<sup>23</sup>

In general terms, the FCRA regulates those businesses selling consumer information for insurance underwriting, extension of credit, and determination of eligibility for employment, and sets the terms under which such information (including public record information) can be used. See 15 U.S.C. § 1681a (d), (f) (defining consumer report and consumer reporting agency, respectively). The entire statute, including its requirement that regulated entities have reasonable procedures designed to ensure the "maximum possible accuracy" of consumer information, see *id.* § 1681e (b), rests in large part on the assumption that consumer reporting agencies have access to state public records.<sup>24</sup>

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<sup>23</sup> See, e.g., Colo. Rev. Stat. § 12-14.3-101 *et seq.*; N.J. Rev. Stat. §§ 56:11-1, -3; Vt. Stat. Ann. tit. 9 § 2480a *et seq.* Congress enacted the FCRA to develop "reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information . . ." 15 U.S.C. § 1681(b). "Those who extend credit or insurance or who offer employment have a right to the facts they need to make sound decisions," and consumer reporting agencies (CRAs) fulfill this vital economic role. S. Rep. No. 91-517, at 2 (1969).

<sup>24</sup> See, e.g., 15 U.S.C. §§ 1681c (a)(1)-(3) (limiting usage of public records such as bankruptcies, civil judgments, arrests,

For example, the FCRA requires regulated entities to re-investigate the disputed accuracy of a consumer report. *Id.* § 1681i (a)(1)(A). If the information is incorrect, even if a middleman supplied the information, nationwide consumer reporting agencies are required to “implement an automated system through which furnishers of information to that consumer reporting agency may report the results of a reinvestigation that finds incomplete or inaccurate information in a consumer’s file to other such consumer reporting agencies.” *Id.* § 1681i(a)(5)(D).

The interstate information flow on which the FCRA depends simply would not work against the Balkanized access regime contemplated by the Fourth Circuit decision. At a minimum, FCRA-required re-investigations will be considerably more difficult to perform on a nationwide or timely basis, because CRAs will be limited to acquiring information only from those states in which they enjoy “citizenship.” While larger CRAs might be able to hire agents in individual states (depending on how

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convictions, and tax liens); *id.* § 1681k (a)(2 (assuming that matters of public record are “considered up to date if the public record status of the item at the time of the report is reported”); *id.* § 1681a(p)(1) (maintaining public records as part of definition of nationwide consumer reporting agency); *id.* § 1681l (maintained with respect to certain reporting activity).

such statutes are construed), the burden of re-investigation weighs more heavily on smaller entities, which may simply not report information from Virginia sources—as the petitioner has elected to do. All of these factors negatively impact consumers, who will have to wait longer to resolve pending issues in their credit history.

#### IV. CONCLUSION

Modern interstate commerce depends on an environment in which national public record information is available to anyone regardless of which state it comes from. VFOIA's facial discrimination against noncitizens violates the Constitution.

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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**AMICUS  
CURIAE  
BRIEF**

**In The  
Supreme Court of the United States**

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MARK J. MCBURNEY and ROGER W. HURLBERT,

*Petitioners,*

v.

NATHANIEL YOUNG, JR., Deputy Commissioner  
and Director, Division of Child Support Enforcement,  
Commonwealth of Virginia and THOMAS C. LITTLE,  
Director, Real Estate Assessment Division,  
Henrico County, Commonwealth of Virginia,

*Respondents.*

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**On Writ Of Certiorari To The  
United States Court Of Appeals  
For The Fourth Circuit**

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**BRIEF OF *AMICUS CURIAE* INSTITUTE  
FOR JUSTICE IN SUPPORT OF PETITIONERS**

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## INTEREST OF THE *AMICUS CURIAE*<sup>1</sup>

The Institute for Justice (IJ) is a nonprofit, public interest law firm committed to defending the essential foundations of a free society and securing the constitutional protections necessary to ensure individual liberty. IJ accomplishes its mission by engaging in litigation and advocacy designed to preserve the fundamental constitutional rights of all Americans. Such activities would be impossible without the ability to obtain public documents from state and local governments across the country. Because access to governmental documents plays such an indispensable part of the fulfillment of IJ's mission, IJ has filed *amicus curiae* briefs in state courts when state and local governments have attempted to withhold documents from public scrutiny. See *Freedom Found. v. Gregoire*, No. 86384-9 (Wash. argued Sept. 20, 2012); *City of Balt. Dev. Corp. v. Carmel Realty Assocs.*, 910 A.2d 406 (Md. 2006). IJ also directly litigates open public records issues. In addition to its litigation activities, IJ regularly conducts original research on matters central to its mission of promoting individual liberty, including research on the

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<sup>1</sup> Counsel for the parties in this case did not author this brief in whole or in part. The parties in this case consented to the filing of the *amicus curiae* briefs in support of their respective positions and letters memorializing such consent have been filed with the clerk. No person or entity, other than *amicus curiae* Institute for Justice, its members, and its counsel made a monetary contribution to the preparation and submission of this brief.



effects of campaign finance laws, eminent domain abuse, barriers to economic activity, and asset forfeiture. The ability to obtain, analyze and discuss the governmental activities and their impacts on the constitutional rights of Americans is largely dependent on the ability to obtain documents memorializing the government's performance of its duties. IJ therefore has a significant interest in preserving the ability to access public records.



## SUMMARY OF THE ARGUMENT

One of the foremost principles that has sustained us as a Union, rather than a mere league of states, is that a state is forbidden from creating distinctions among residents and nonresidents when such distinctions "hinder the formation, the purpose, or the development of a single Union. . . ." *United Bldg. & Constr. Trades Council v. City of Camden*, 465 U.S. 208, 218 (1984) (citations and quotation marks omitted). For those "privileges" and "immunities" "bearing upon the vitality of the Nation as a single entity," a state is required to "treat all citizens, resident and nonresident, equally." *Baldwin v. Mont. Fish & Game Comm'n*, 436 U.S. 371, 383 (1978). In this case, the Commonwealth of Virginia maintains that it may withhold documents regarding the performance of its government functions from all but Virginia residents. The question before the Court, therefore, is whether

the ability of nonresidents to obtain information regarding the Commonwealth's activities "bear[s] upon the vitality of the Nation as a single entity."<sup>2</sup>

There is little question that it does. If the federal Constitution is to be uniformly applied across the country, states cannot shield their activities from those who live outside the state but who have clients or interests protected by the federal Constitution within that state. As this Court has recognized, out-of-state attorneys or law firms may often times be the only individuals or entities available to vindicate federal rights. This role is especially pronounced in public interest litigation, where clients are often unable to pay, or even find, local counsel willing to challenge the economic and political establishments of the communities in which they live. For IJ and other

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<sup>2</sup> Of course, even if the ability of nonresidents to obtain government documents is protected by the Privileges and Immunities Clause, that does not end the constitutional inquiry. Virginia's law can still survive if the Commonwealth can demonstrate that it possesses a "substantial reason" for the difference in its treatment of Virginians and non-Virginians and its discrimination against nonresidents bears a substantial relationship to the Commonwealth's objective. See *United Bldg. & Constr. Trades Council*, 465 U.S. at 222. Virginia has made little effort to do either, however. IJ thus confines its analysis to whether the ability to obtain public records is protected by the Clause, as that question appears determinative. IJ concurs with Petitioners, however, that the Virginia statute fails the test for violations of the Privileges and Immunities Clause. IJ also agrees with Petitioners that this law violates the Dormant Commerce Clause.

public interest law firms, being able to access public records allows these firms to determine whether state and local governments are violating the civil rights of in-state residents and whether such a violation should be the subject of litigation.

The importance of public records is not limited to litigation, however. For organizations that research public policy issues and publish their findings, the ability to obtain public documents permits them to engage in comparative analysis regarding state and local governments and communicate effectively about how governments perform across the country. The ability of researchers and advocacy groups to obtain such records thus promotes discussion of national trends and the broader applicability of local remedies for societal problems. If states can block access to public records, it will become increasingly difficult for lawmakers and citizens to make intelligent policy decisions – even ones with a national impact – on a national scale.

Finally, for those instances where the courts have determined that the political process should be the main avenue for the protection of rights, the ability of out-of-state residents to obtain public records is critical. Quite simply, the abuse of constitutional rights of nonresidents is unlikely to go unchecked by the state political process given that those who are disadvantaged are, by definition, disenfranchised as well. Public scrutiny of the performance of government functions is thus essential if nonresidents who

own property, make investments, or have family ties to a state are to determine whether the government's interaction with them is done within constitutional boundaries.

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## ARGUMENT

### **I. The Purpose Of the Privileges And Immunities Clause Is To Prohibit Discrimination By One State Against Residents Of The Several States**

The very purpose of the Privileges and Immunities Clause is to prevent the kind of discrimination against, and barriers to, nonresidents that Virginia has erected in its law limiting access to public records to only Virginia residents. Such discrimination in favor of in-state interests was well known to the Framers and is precisely the kind of parochial disadvantage that motivated them to adopt the Privileges and Immunities Clause.

"During the preconstitutional period, the practice of some States denying to outlanders the treatment that its citizens demanded for themselves was widespread," and such "discriminations . . . were by no means eradicated during the short life of the Confederation." *Austin v. N.H.*, 420 U.S. 656, 660 (1975). At the Constitutional Convention, James Madison (of Virginia) decried the problem of states discriminating against residents of sister states and therefore insisted that the Constitution provide robust protection

of citizens' privileges in interstate transactions. The new charter, he explained, must prevent the kind of "trespasses of the States on each other." 1 *Records of the Federal Convention of 1787* 317 (M. Farrand ed. 1911). Madison complained specifically of the "Acts of Virga. & Maryland which give a preference to their own citizens in cases where the Citizens (of other states) are entitled to equality of privileges by the Articles of Confederation," a complaint one can only view as ironic in light of the position taken by Virginia in the instant proceeding. *United Bldg. & Constr. Trades*, 465 U.S. at 225 (Blackmun, J., dissenting) (quoting 1 *Records of the Federal Convention of 1787* 317 (M. Farrand ed. 1911)). He and the other Framers recognized that if the new Nation was to thrive and prosper, such "trespasses" must end.

It was out of this concern that the Privileges and Immunities Clause was born. Its "primary purpose," this Court has emphasized, "was to help fuse into one Nation a collection of independent, sovereign States." *Toomer v. Witsell*, 334 U.S. 385, 395 (1948). It did so by "plac[ing] the citizens of each State upon the same footing with citizens of other States – reliev[ing] them from the disabilities of alienage in other States" and "inhibit[ing] discriminating legislation against them by other States." *Paul v. Va.*, 75 U.S. 168, 180 (1868), *overruled on other grounds by U.S. v. Se. Underwriters Ass'n*, 322 U.S. 553 (1944).

So critical to the success of the Republic was the Privileges and Immunities Clause that Alexander



Hamilton, in urging ratification, called it “the basis of the Union” – a guarantee that “equality of privileges and immunities” would remain “inviolable” for citizens of all states, in all states. *The Federalist No. 80* (Alexander Hamilton).

Indeed, without some provision of the kind removing from the citizens of each State the disabilities of alienage in the other States, and giving them equality of privilege with citizens of those States, the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists.

*Paul*, 75 U.S. at 180.

Thus, the Privileges and Immunities Clause “was always understood as having but one design and meaning, *viz.*, to secure to the citizens of every State, within every other, the privileges and immunities . . . accorded in each to its own citizens. It was intended to guard against a State discriminating in favor of its own citizens.” *Lemmon v. People*, 20 N.Y. 562, 626-27 (1860). “[N]o provision in the Constitution has tended so strongly to constitute the citizens of the United States one people at this,” *Paul*, 75 U.S. at 180, and the Clause has therefore rightly been called the “palladium of equal fundamental civil rights for all citizens.” Cong. Globe, 39th Cong., 1st Sess. 1836 (1866) (statement of Rep. Lawrence).

## **II. The Right To Obtain Government Documents Falls Within The Purview Of The Privileges And Immunities Clause Because It Is Fundamental To The Promotion Of The Vitality Of The Nation**

The Commonwealth purports to support the general principle of non-discrimination against out-of-staters, but nonetheless argues that access to government documents is simply not a "privilege and immunity." It claims that it can therefore distinguish among Virginians and all others in allowing access to such records. See Resp'ts' Br. Opposing Pet. Cert. 15. However, it is clear that the ability to access public documents is a privilege the Commonwealth cannot extend to only its citizens without extending it to all other Americans.

### **A. The Ability To Access Public Records Is Essential To The Uniform Enforcement Of Civil Rights**

State and local officials often violate the civil rights of in-state residents and these residents may only be able to obtain out-of-state counsel. Similarly, out-of-state residents may enter into a state and interact with government officials. In both instances, the ability of Americans to determine whether local officials have treated them in a manner consistent with the federal Constitution may depend on someone from out-of-state obtaining public records regarding the performance of governmental responsibilities.

The ability to obtain public records thus becomes an important prerequisite for the effective enforcement of the Fourteenth Amendment and the Civil Rights Act of 1871, 42 U.S.C. § 1983.

In that regard, this Court recognized in *Supreme Court of N.H. v. Piper*, 470 U.S. 274, 281 (1985), that “[o]ut-of-state lawyers may – and often do – represent persons who raise unpopular federal claims. In some cases, representation by nonresident counsel may be the only means available for the vindication of federal rights.” This conclusion is particularly true for public interest firms who represent the interests of the poor, marginalized, or politically powerless against the political and economic establishments of their home state. Under Virginia’s law, however, the ability of out-of-state public interest attorneys to effectively represent their clients would be severely hampered by the fact that these attorneys could not obtain public records from the Commonwealth. The inability to obtain public records could therefore mean that serious violations of fundamental federal rights would go without a remedy.

IJ’s own experiences demonstrate this important point. For instance, IJ obtained public records from the City of National City, California, regarding that municipality’s attempts to redevelopment the property upon which IJ’s client – a nonprofit boxing gym dedicated to providing a safe place for at-risk youths – sat. With IJ’s assistance, the Community Youth

Athletic Center (CYAC) was able to successfully challenge National City's efforts by demonstrating, among other things, that National City had violated CYAC's right to due process under the Fifth and Fourteenth Amendments. Without the ability of CYAC's attorneys to obtain public records, however, this vital part of this community could have been lost. In other words, had the CYAC been located in Virginia and represented by an out-of-state firm, the ability of the CYAC's lawyers to vindicate the gym's rights would have been severely compromised.<sup>3</sup>

Similarly, IJ attempted to determine whether Georgia law enforcement agencies had complied with a state law that mandates such agencies publicly report annual forfeiture proceeds and expenditures. IJ found that many Georgia law enforcement agencies completely ignored this obligation. See Erin Norman & Anthony Sanders, *Forfeiting Accountability:*

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<sup>3</sup> Virginia may argue that residents can still obtain documents and that, in circumstances like the case involving the CYAC, IJ could have found an in-state resident to make the requests. This is an inadequate alternative for a number of reasons. First, in preparing for litigation, time is often of the essence. Locating an in-state resident to essentially act as a sock puppet for an out-of-state attorney can needlessly delay the vindication of important federal rights. Moreover, if the in-state resident is unsophisticated and unable to challenge unjustified or unsupportable denials of public records, the out-of-state attorney will soon need to come to the fore regardless. Finally, if using an in-state proxy is such a simple solution, it is difficult to understand why Virginia needs this restriction in the first place.

*Georgia Law Enforcement's Hidden Civil Forfeiture Funds* (March 2011), available at [www.ij.org/images/pdf\\_folder/other\\_pubs/forfeitingaccountability\\_final.pdf](http://www.ij.org/images/pdf_folder/other_pubs/forfeitingaccountability_final.pdf). As a result of the information uncovered through the use of public records requests, concerned Georgia citizens sued leading law enforcement agencies in Georgia to force them to disclose the property they had seized, as well as the purposes to which they devoted such property. See *Van Meter v. Turner*, No. 2011CV198536 (Fulton Cnty. Sup. Ct. 2011). The case concluded when all three agencies admitted to violating Georgia law in not reporting forfeiture proceeds and expenditures, and agreeing to follow the law in the future.<sup>4</sup>

These two examples demonstrate that public interest law is an inherently interstate activity. From the out-of-state attorneys willing to represent civil rights advocates in the 1950's and 1960's to the attorneys of today who litigate various less dangerous but nonetheless crucial issues outside their home states, public interest lawyers have played an essential role in promoting and realizing the uniform enforcement of federal rights across the country. Viewed

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<sup>4</sup> Conversely, an attorney's ability to obtain public records regarding a law that appears to be constitutionally problematic on its face may demonstrate that state and local officials are enforcing the law in a constitutional manner. In such instances, the ability to obtain records deters unnecessary and wasteful litigation.



in this context, Virginia's restriction should be seen for what it is – a petty and unnecessary attempt to make it difficult to oversee the Commonwealth's activities and hold it accountable. Such a parochial and paternalistic approach hardly contributes to "inter-state harmony."

**B. The Ability To Obtain Public Records Is Vital To Informed Analysis Of Governmental Activities Across The Country**

Public records are not only used for litigation, of course. They also provide valuable information for researchers, social scientists, policy advocates, and think tanks wishing to analyze state and local government in comparative perspective. The inability to obtain public records decreases the amount of information available and can lead to incomplete or erroneous conclusions about some of the most significant public policy issues of the day.

Again, IJ's own experience bears this out. IJ uses public records requests in its original research and has successfully brought a number of neglected issues to the forefront of national debate. For instance, IJ used public records to uncover the abuse of asset forfeiture in Texas, which resulted in a state lawsuit. It has uncovered the existence of similar problems in Arizona. See Scott Bullock & Dick M. Carpenter II, Ph.D., *Forfeiting Justice: How Texas Police and Prosecutors Cash In On Seized Property* (November

2010), *available at* [www.ij.org/pdf\\_folder/other\\_pubs/forfeitingjusticefinal.pdf](http://www.ij.org/pdf_folder/other_pubs/forfeitingjusticefinal.pdf); Tim Keller, Diana Simpson & Dick M. Carpenter II, Ph.D., *Arizona's Profit Incentive in Civil Forfeiture: Dangerous for law enforcement: Dangerous for Arizonans* (December 2012), *available at* [www.ij.org/images/pdf\\_folder/private\\_property/forfeiture/az-forfeiture-report.pdf](http://www.ij.org/images/pdf_folder/private_property/forfeiture/az-forfeiture-report.pdf). As a result of IJ's ability to obtain such records, it was able to promote a national discussion of this often-overlooked topic.

IJ has also used public records to uncover similar abuses of government power regarding the extensive use of eminent domain for private purposes. See Dana Berliner, *Public Power, Private Gain: A Five-Year, State-by-State Report Examining the Abuse of Eminent Domain* (April 2003), *available at* [www.castlecoalition.org/pdf/report/ED\\_report.pdf](http://www.castlecoalition.org/pdf/report/ED_report.pdf). This effort resulted in increased attention to "private takings" and IJ's eminent domain study was cited by Justice O'Connor in her dissent in *Kelo v. New London*, 545 U.S. 469, 503 (2005) (O'Connor, J., dissenting). After that decision, IJ's study became a key component of the national movement to reform eminent domain laws.

In both instances, the ability to investigate and publicize government abuses was entirely dependent on the ability of IJ, an out-of-state organization, to obtain public records. In that regard, it is clear that in order to understand national trends in public policy and governmental actions, a researcher must compare what one state is doing against other states.

Without the ability to obtain public records, however, there can be huge gaps in the data if states withhold their public documents from researchers, think tanks, public policy experts, and universities. If states are indeed the “laboratories of democracy,” see *New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting), then laws like Virginia’s lock the laboratory doors and hide the formulas. This protectionist scheme thus works against the “maintenance or well-being of the Union.” *Baldwin*, 436 U.S. at 388.

**C. It Is Vitally Important To Interstate Harmony For Out-Of-State Residents To Be Able To Monitor The Activities Of Political Entities Who May Affect Their Interests But To Which They Do Not Belong**

In addition, the ability of nonresidents to obtain public documents is also essential when the courts have concluded that the political process is the primary means for protecting one’s interests.

For instance, in *Kelo*, this Court held that the taking at issue was constitutional because it was done pursuant to “a ‘carefully considered’ development plan.” *Kelo*, 545 U.S. at 478. This Court noted that New London had followed the requisite statutory procedural requirements, held hearings, and conducted neighborhood meetings. In light of this governmental activity, the Court held that there was no

evidence of illegitimate purpose in the case and that the plan was not adopted to benefit a particular class of identifiable individuals. In contrast, the Court warned that the “one-to-one transfer of property, executed outside the confines of an integrated development plan” was not presented in that case and suggested that such a transfer “would certainly raise a suspicion that a private purpose was afoot.” *Id.* at 487. Justice Kennedy, in particular, strongly implied that the plan’s viability under the U.S. Constitution depended largely on the extensive evidence demonstrating New London’s compliance with “elaborate procedural requirements that facilitate review of the record and inquiry into the city’s purposes.” *Id.* at 493 (Kennedy, J., concurring). The existence of a thorough and open process was therefore key to the Court’s conclusion that New London’s plan followed the dictates of the federal Constitution.

*Kelo*, of course, concerned Connecticut residents,<sup>5</sup> but property owners are not always residents of the states in which they own property. An individual may own a vacation home, business, or second home in a state in which they do not primarily reside. In such instances, Virginia<sup>6</sup> argues that it and other states

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<sup>5</sup> IJ represented Ms. Kelo and the other homeowners in her challenge to New London’s attempt to condemn her home.

<sup>6</sup> The scenario IJ lays out here – the condemnation of an out-of-state resident’s land for a private purpose – is now forbidden by the Virginia Constitution. Va. Const. art. I, § 11 (amended 2012). This amendment, in and of itself, demonstrates how interconnected Virginia is with the rest of the country as  
(Continued on following page)

and municipal governments may act without the ability of the property owner to determine whether a proposed exercise of eminent domain falls outside of constitutional boundaries. In other words, when it deals with the property of out-of-state individuals and entities, states like Virginia essentially claim they can dispense with the thorough and open planning process this Court found was so critical to the constitutionality of the New London project. In such instances, these governments have taken from out-of-state property owners one of their last defenses to an unconstitutional condemnation: the ability to collect information about whether the project is undertaken for a private purpose. They are left to the mercies of a

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the passage or failure of an initiative is a political signal of extensive significance in this country. One need only look to the national ramifications of Howard Jarvis's taxpayer's revolt in California that resulted in Proposition 13 to understand that the impact of the success or failure of an initiative does not stop at the border of a state. Proposition 13 was described as "a political earthquake whose jolt was felt not just in Sacramento but all across the nation, including Washington D.C. . . . Within five years of Proposition 13's passage, nearly half the states strapped a similar straightjacket on politicians' tax-raising capabilities." Stephen Moore, *Proposition 13 Then, Now and Forever*, available at [http://www.cato.org/pub\\_display.php?pub\\_id=5682](http://www.cato.org/pub_display.php?pub_id=5682) (July 30, 1998). The passage of gay marriage initiatives in Maine and Washington and initiatives legalizing the possession of certain amounts of marijuana in Colorado and Washington could have similar ramifications nationwide. Nonetheless, if these states were to adopt Virginia's approach to public records, the ability of a resident of another state facing a "political earthquake" would not be able to obtain the most basic information regarding the state government where the first rumbles were felt.



political system to which they do not belong and in which they may not participate.<sup>7</sup>

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## CONCLUSION

The ability of Americans to obtain the public records of states in which they do not reside bears directly and significantly on the vitality of the Nation as a single entity. For this reason, the decision of the Fourth Circuit should be reversed.

Respectfully submitted,

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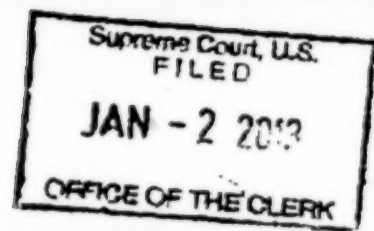
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<sup>7</sup> Moreover, as noted above, public records led to significant reform by in-state residents, assisted by national advocacy groups like IJ. The ability to obtain public records played a critical role in eminent domain reform, as it has in other areas of law and public policy. It is precisely this kind of informed public policy discussion that such protectionist laws retard.

**AMICUS  
CURIAE  
BRIEF**

TABLED  
AND  
BRIEFS

No. 12-17



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IN THE  
**Supreme Court of the United States**

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Mark J. McBurney, *et al.*,

*Petitioners,*

v.

Nathaniel L. Young, Deputy Commissioner  
and Director, Virginia Division of Child  
Support Enforcement, *et al.*,

*Respondents.*

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**On Writ of Certiorari to the United States  
Court of Appeals for the Fourth Circuit**

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**BRIEF OF *AMICI CURIAE*  
JUDICIAL WATCH, INC. AND  
ALLIED EDUCATIONAL FOUNDATION  
IN SUPPORT OF PETITIONERS**

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## QUESTION PRESENTED

Under the Privileges and Immunities Clause of Article IV and the dormant Commerce Clause of the United States Constitution, may a state preclude citizens of other states from enjoying the same right of access to public records that the state affords its own citizens?

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## INTEREST OF THE *AMICI CURIAE*<sup>1</sup>

Judicial Watch, Inc. (“Judicial Watch”) is a not-for-profit, educational foundation that seeks to promote integrity, transparency, and accountability in government and fidelity to the rule of law. In furtherance of its public interest mission, Judicial Watch regularly requests access to public records of federal, state, and local government agencies and officials and disseminates its findings to the public. In addition, Judicial Watch regularly files *amicus curiae* briefs and has appeared as an *amicus curiae* in this Court on a number of occasions.

The Allied Educational Foundation (“AEF”) is a not-for-profit, charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study. AEF regularly files *amicus curiae* briefs as a means to advance its purpose and has appeared as an *amicus curiae* in this Court on a number of occasions.

As educational foundations, *Amici* are concerned that if the Fourth Circuit’s opinion is not reversed, a valuable weapon in their arsenal will be weakened, if not lost entirely. The ability of organizations and individuals such as *Amici* to access public records of all states is vital to them furthering their public interest missions. In this brief, *Amici* intend to

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<sup>1</sup> Pursuant to Supreme Court Rule 37.6, *Amici Curiae* state that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *Amici Curiae* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties have consented to the filing of this brief; letters reflecting the parties’ consent have been filed with the Clerk.

present the history of the right of access to public records as well as how *Amici* recently have exercised this right. In doing so, *Amici* seek to help demonstrate that the right of access to public records is basic to the maintenance and well-being of the country. Because the right of access to public records bears upon the vitality of the nation as a single entity, the Court should reverse the lower court's decision and reaffirm the right of all persons to access public records from all states.

### SUMMARY OF THE ARGUMENT

The "Privileges and Immunities Clause" of Article IV of the U.S. Constitution protects basic rights bearing upon the vitality of the nation as a single entity. One such right is the right of access to public records. Since the founding of the nation, courts have recognized the right of the people to gain access to and inspect the public records of state and local governments. However, just because the requested records may be those of a city, county, or state government does not mean such records are only of local importance and value. The inspection of public records of city, county, and state governments are relevant to and often shed light on the policies and activities of the federal government. Sometimes, gaining access to local records is the only way to fully understand the actions of the federal government. In addition, many policy decisions or activities of local governments are being debated or implemented in other localities across the nation. Therefore, the right of access to a public record not only sheds light on local government, but it also bears upon the vitality of the nation as a single entity.



## ARGUMENT

### I.     **The “Privileges and Immunities Clause” Protects the Rights of All Citizens of Free Governments.**

Article IV, Section 2 of the United States Constitution states, “The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.” The clause, commonly referred to as the “Privileges and Immunities Clause” or the “Comity Clause,” was intended to “fuse into one Nation a collection of independent, sovereign States.” *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 279 (1985) (quoting *Toomer v. Witsell*, 334 U.S. 385, 395 (1948)); see also *Austin v. New Hampshire*, 420 U.S. 656, 662 (1975) (“The Privileges and Immunities Clause, by making noncitizenship or nonresidence an improper basis for locating a special burden, implicates . . . the structural balance essential to the concept of federalism.”). The Court has not definitively designated what constitutes “privileges and immunities;” however, it has interpreted the clause at various times through the years. In the *Slaughter-House Cases*, the Court adopted the analysis found in *Corfield v. Coryell*, 6 F. Cas. 546 (CC ED Pa. 1825). 83 U.S. 36, 76 (1873). Specifically, the Court reiterated:

The inquiry . . . is, what are the privileges and immunities of citizens of the several States? We feel no hesitation in confining these expressions to those privileges and immunities which are fundamental; which belong of right to the citizens of all free governments, and

which have at all times been enjoyed by citizens of the several States which compose this Union, from the time of their becoming free, independent, and sovereign.

*Slaughter-House Cases*, 83 U.S. at 76 (quoting *Corfield*, 6 F. Cas. at 551). In addition, the Court explained that the court in *Corfield* found that the “privileges and immunities” were

those rights which are fundamental. Throughout [the] opinion, [“privileges and immunities”] are spoken of as rights belonging to the individual as a citizen of a State. . . . And they have always been held to be the class of rights which the State governments were created to establish and secure.

*Slaughter-House Cases*, 83 U.S. at 76.

In *Baldwin v. Fish and Game Commission of Montana*, 436 U.S. 371 (1978), the Court held that the state of Montana could charge nonresidents higher fees to obtain an elk-hunting license than it charged residents of Montana to obtain the same license. In doing so, the Court explained that states may treat residents and nonresidents differently; however, some distinctions “are prohibited because they hinder the formation, the purpose, or the development of a single Union of those States.” *Baldwin*, 436 U.S. at 383. The “Privileges and Immunities Clause” therefore protects all rights “bearing upon the vitality of the Nation as a single entity.” *Id.*

The Court recently affirmed this interpretation and expounded that the Court “has never held that the Privileges and Immunities Clause protects only economic interests.” *Piper*, 470 U.S. at 281. At issue in *Piper* was whether the state of Vermont could restrict bar admissions to state residents only. *Id.* at 275. In holding that such a restriction violated the “Privileges and Immunities Clause,” the Court stated:

We believe that the legal profession has a noncommercial role and duty that reinforce the view that the practice of law falls within the ambit of the Privileges and Immunities Clause. Out-of-state lawyers may – and often do – represent persons who raise unpopular federal claims. In some cases, representation by nonresident counsel may be the only means available for the vindication of federal rights. The lawyer who champions unpopular causes surely is as important to the maintenance or well-being of the Union.

*Id.* at 281 (internal citations omitted). In some instances, only nonresidents will challenge the policy decisions or activities of local governments.

## **II. The Right of Access to Public Records Is a Well-Recognized Common Law Right.**

As the Court has previously declared, “It is clear that the courts of this country recognize a general right to inspect and copy public records and documents.” *Nixon v. Warner Communications, Inc.*, 435

U.S. 589, 597 (1978). In addition, the United States Court of Appeals for the District of Columbia Circuit has stated that "the right of access" exists "in the common law of the states." *Washington Legal Foundation v. U.S. Sentencing Commission*, 89 F.3d 897, 903 (D.C. Cir. 1996). In other words, the right of access to public records applies not only to public records of the federal government but also public records of state governments.

For over 100 years, state courts have recognized the common law rule that "every person is entitled to the inspection of" public documents. *State v. Williams*, 41 N.J.L. 332, 334 (N.J. 1879); *see also* *Burton v. Tuite*, 78 Mich. 363, 374 (1889) ("I do not think that any common law ever obtained in this free government that would deny the people thereof the right of free access to, and public inspection of, public records."). Significantly, in 1891, the Virginia Supreme Court held, "At common law, the right to inspect public documents is well defined and understood." *Clay v. Ballard*, 87 Va. 787, 791 (1891).

Although much of the concern of the courts focused on whether a citizen had a private, individualized interest in the requested records, case law also illustrates the importance of the right of access to public documents for the general good. For example, in 1900, an individual requested access to the public records of the auditor's office in a town of Indiana for the purpose of "discovering whether the money and property of the county had been duly accounted for by the persons and officers charged with the collection and disbursement of the same." *State v. King*, 154 Ind. 621, 622 (1900). The town auditor refused to provide access to public records because, he as-

serted, the requester did not have a personal interest in the requested records. The court rejected that argument. In ordering the town auditor to provide access to the requested records, the court stated, "The general rule which obtained at common law was that every person was entitled to an inspection of public records, by himself or agent, provided he had an interest in the matters to which such records related." *Id.* at 625. In addition, the court held that a person's interest "to discover the condition of the public . . . to ascertain if the affairs of his county have been honestly and faithfully administered by the public officials charged with that duty" is completely appropriate. *Id.* The right of access to public records is therefore grounded in the public's right to know "what the government is up to." *U.S. Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 800 (1989); see also *National Archives and Records Administration v. Favish*, 541 U.S. 157, 172 (2004) (The Court recognized that the information contained in public records "belongs to [the] citizens.").

In 1928, the Michigan Supreme Court again examined the common law right of access to public records and the origin of that right. In doing so, it noted, "If there be any rule of the English common law that denies the public the right of access to public records, it is repugnant to the spirit of our democratic institutions. Ours is a government of the people." *Nowack v. Auditor General*, 234 Mich. 200, 203 (1928). In addition, the court stated, "There is no question as to the common-law right of the people at large to inspect public documents and records." *Id.* at 204. Moreover, it reinforced the notion that



the common law right "to inspect public records" includes those circumstances when a person's interest is solely that "as a member of the general public." *Id.*

In the last 60 years, state legislatures have enacted statutes addressing the right of access to public records. However, the statutory right does not narrow or displace the common law right of access. Courts continue to recognize "the right to an examination of public records, either under statutory grant or on common law principles." *Wiley v. Woods*, 393 Pa. 341, 346 (1958).

As demonstrated above, the right of access to public records is nothing new. In fact, the basic right to inspect public records has played an important role in the maintenance of democracies in state and local governments since the founding of the individual states as well as the formation of the nation as a whole. As the former Chief Justice of the Ohio Supreme Court expressed:

The public availability of government information has long been recognized as a fundamental tenet upon which democratic theory rests. This principle, venerated by the founding fathers and later codified by state legislatures, has its foundation in the common-law courts of England. . . . The common-law right to inspect government documents has been recognized in Ohio since the earliest reported court decisions. As there was no statutory provision to the contrary (and no constitutional mandate),

the right to inspect public records was subject only to the condition that the inspection did not endanger the safety of the record or unreasonably interfere with the duties of the public official having custody of the record. These early Ohio cases, like those of other jurisdictions, recognized that public records were available for inspection regardless of whether an individual had a private interest in the record.

Thomas J. Moyer, *Interpreting Ohio's Sunshine Laws: a Judicial Perspective*, 59 N.Y.U. ANN. SURV. AM. L. 247, 247-248 (2003). In sum, the right of access to public records is a basic right of all persons in democratic societies.

### **III. The Right of Access to Public Records of All States is Important to the Maintenance and Well-Being of the Union.**

In its opinion, the Fourth Circuit held, "Access to a state's records simply does not bear upon the vitality of the Nation as a single entity." *McBurney v. Young*, 667 F.3d 454, 466 (4th Cir. 2012) (internal quotations omitted). Such a sweeping declaration is simply incorrect. As the Third Circuit noted:

No state is an island – at least in the figurative sense – and some events which take place in an individual state may be relevant to and have an impact upon the policies of not only the national government but also of the states. Accordingly, political advocacy regard-

ing matters of national interest or interests common between the states play an important role in furthering a vital national economy and vindicating individual rights.

*Lee v. Minner*, 458 F.3d 194, 199-200 (3d Cir. 2006). Although each state is sovereign, the actions and policies of an individual state often have an effect on other states and the nation as a whole.

This interconnectedness is evident in the recent attempt by the federal government to address the recent housing meltdown. In February 2012, federal and state officials entered into a \$26 billion foreclosure settlement with five of the largest home lenders. Chris Isidore & Jennifer Liberto, *Mortgage deal could bring billions in relief*, CNN Money (Feb. 15, 2012), available at <http://money.cnn.com>. The agreement settled the potential charges brought by individual states concerning allegations against numerous companies of improper foreclosures. *Id.* The settlement, which was signed by the U.S. Department of Justice, the U.S. Department of Housing and Urban Development, and 49 state attorneys general, created a federal monitoring system to oversee the foreclosure process and to assist distressed homeowners in receiving assistance related to prior foreclosures of their homes. *Id.* Clearly, the federal government was instrumental in orchestrating a settlement between the individual states and the mortgage lenders.

Yet the extent of the federal government's involvement in the day-to-day negotiations was not disclosed to the public. During a March 16, 2011

hearing of the House Financial Services Subcommittee on Financial Institutions and Consumer Credit, Elizabeth Warren, the interim head of the Consumer Financial Protection Bureau ("CFPB"), characterized the CFPB's involvement in the state settlement negotiations as: "We have been asked for advice by the Department of Justice, by the Secretary of the Treasury, and by other federal agencies. And when asked for advice, we have given our advice." Press Release, *Chairman Bachus Comments on Elizabeth Warren's Role in Mortgage Settlement Talks*, The Committee on Financial Services (Apr. 4, 2011). Because Ms. Warren did not indicate with any specificity the CFPB's role in the settlement negotiations, *Amicus* Judicial Watch sought public records from the CFPB under the federal Freedom of Information Act. For whatever reason, the federal agency failed to provide all relevant and responsive records. Therefore, Judicial Watch expanded its investigation and sought access to public records of all 50 state attorneys general.

In response to its requests for access to public records of all state attorneys general, Judicial Watch received records such as electronic mail, meeting minutes, and memoranda from more than half of the attorneys general. These public records demonstrated, among other things, that Ms. Warren initiated and led emergency meetings with state attorneys general that her office had insisted remain secret. See *Letter to the Honorable Timothy Geithner*, U.S. House of Representatives Committee on Financial Services, dated June 20, 2011, available at <http://financialservices.house.gov>. In addition, the public records suggest that the CFPB's participation

in the settlement negotiations was far more intense and aggressive than Ms. Warren described to Congress. Therefore, the ability to inspect public records of numerous states provided the public with a more complete understanding of the federal government's role in the settlement agreement between state attorneys general and the mortgage lenders. The public records of the state attorneys general inspected by Judicial Watch directly relate to the "vitality of the Nation as a single entity." *Baldwin*, 436 U.S. at 383.

Similarly, Judicial Watch investigated the circumstances underlying the U.S. Department of Justice's announcement that the Department of Justice had entered into a consent decree with the City of Dayton concerning the allegation that the city had engaged in discrimination against African-Americans in its hiring of entry-level police officers and firefighters in violation of Title VII of the Civil Rights Act of 1964. Judicial Watch originally sought access to public records directly from the Department of Justice. Because the federal agency failed to respond to the Freedom of Information Act request, Judicial Watch sought access to public records under the Ohio Public Records Act.

In response to Judicial Watch's request for communications between the Department of Justice and the Dayton Fire Department, the local entity provided records detailing the Department of Justice's objections to the entrance examinations used by the City of Dayton. Specifically, Judicial Watch discovered that the Department of Justice disapproved of the use of written tests for firefighter applicants purportedly because it is very unlikely that an entry-



level firefighter would have to do much writing. Judicial Watch subsequently disseminated this information to the public. Through access to the public records of the City of Dayton, Judicial Watch was able to shed light on how the U.S. Department of Justice used its enforcement authority under the Civil Rights Act of 1964 to prevent the Dayton Fire Department from testing whether firefighter applicants had the ability to write. The public records of the City of Dayton directly related to the activities of the federal government and the "Nation as a single entity." *Baldwin*, 436 U.S. at 383.

Besides shedding light on the federal government's interactions with state governments, the right of access to public records of all states also allows for the inspection of controversial information that may not otherwise be inspected. A citizen of a state may be reluctant to request access to particular records due to the sensitivity or nature of the public records. In such instances, an individual or organization outside the state may be the only entity willing to request an unpopular inspection. *Piper*, 470 U.S. at 281. Most importantly, such a situation is not merely hypothetical. In fact, Judicial Watch frequently requests access to a state's public records that citizens of that state may be reluctant to request because of undesired consequences. Through the right of access to public records, Judicial Watch has revealed corrupt practices of police departments, abuses of authority by regulating bodies, and waste of taxpayer funds on illegal expenditures.

For example, Judicial Watch was recently in litigation with the Colorado Attorney Regulation Counsel relating to records created and maintained by one

of the administrative offices of the Colorado Supreme Court. As one court described Judicial Watch's efforts:

Judicial Watch questions the use of one state's resources (here, in the person of [the Attorney regulation Counsel] and his staff), to assist another state in a politically-charged ethics probe. Further, in this time of state budget shortfalls, the people of this State no doubt would be interested in how it came to be that a state employee was ordered to work for another jurisdiction and whether Colorado was adequately reimbursed for that work.

*Gleason v. Judicial Watch, Inc.*, Case No. 10CV0952, City and County of Denver District Court (Bruce, J., Apr. 22, 2011). It is self-evident that the challenge to the authority and decision-making of the Colorado Supreme Court is unpopular and controversial. It is also likely that attorneys within the state would be hesitant to challenge their regulators. Therefore, without individuals or organizations like *Amici*, questions concerning the use of one state's resources may remain unanswered. In such scenarios, the right of noncitizens to access public records is no different than the noncitizen-attorney's ability to try unpopular cases within a state. The requester is just as important to the "maintenance or well-being of the Union" as "[t]he lawyer who champions unpopular causes" and as "the shrimp fisherman in *Toomer* or the pipeline worker in *Hicklin*."

#### **IV. The State of Virginia Is Entitled to Impose Reasonable Fees on Records Requesters.**

The State of Virginia may impose reasonable charges on individuals or entities that seek access to public records. Such fees may be imposed not only on residents but also nonresidents of the state. Therefore, the state would not be burdened by additional costs; it may recoup all monies expended to produce public records to residents and nonresidents alike.

In *Barnard v. Thorstenn*, the Court, similar to its opinion in *Piper*, held that the residency requirement of the Bar of the District Court of the Virgin Islands violated the Privileges and Immunities Clause. 489 U.S. 546, 559 (1989). In its holding, the Court explained:

Petitioners' fourth contention, that the Virgin Islands Bar Association does not have the resources and personnel for adequate supervision of the ethics of a nationwide bar membership, is not a justification for the discrimination imposed here. Increased bar membership brings increased revenue through dues. Each lawyer admitted to practice in the Virgin Islands pays an initial fee of \$200 to take the bar examination, annual bar association dues of \$100, and an annual license fee of \$500. There is no reason to believe that the additional moneys received from nonresident

members will not be adequate to pay for any additional administrative burden.

*Id.* at 558-559. In other words, preventing admission to the Bar by nonresidents was not justified by the potential administrative burden placed on the Bar. The Bar could collect dues from residents and nonresidents alike to cover the costs associated with monitoring the activities of its members. This principle applies in the public records context as well. The fact that the state may incur additional costs in processing public records requests of nonresidents does not justify the state denying nonresidents the ability to seek public records.

### CONCLUSION

The right of access to public records preexists the formation of the nation. In fact, the right of access to public records predates the development of the states. Individuals have always relied on the right to seek public records from city, county, and state governments to ensure that the people's representatives are properly and positively maintaining democracies and adhering to good government principles. If not reversed, the Fourth Circuit's ruling will hinder, if not abolish, the people's ability to monitor the workings of all governments. Because many policy decisions and activities of local governments are being debated or implemented in other localities across the nation or effect the United States as a whole, the right of access to a public record not only sheds light on local government, but it also directly bears upon the vitality of the nation as a single entity. For the foregoing reasons, *Amici* respectfully request that the Court reverse the Fourth Circuit's

decision and hold that citizens of other states enjoy the same right of access to public records that the state affords its own citizens.

Respectfully submitted,

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January 2, 2013



**AMICUS  
CURIAE  
BRIEF**

In The  
Supreme Court of the United States

---

MARK J. MCBURNEY AND ROGER W. HURLBERT,

*Petitioners,*

v.

NATHANIEL YOUNG, JR., Deputy Commissioner and  
Director, Division of Child Support Enforcement,  
Commonwealth of Virginia, and  
THOMAS C. LITTLE, Real Estate Assessment Division,  
Henrico County, Commonwealth of Virginia,

*Respondents.*

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On Writ of Certiorari to the  
United States Court of Appeals  
for the Fourth Circuit

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**BRIEF OF *AMICI CURIAE* LOCAL GOVERNMENT  
ATTORNEYS OF VIRGINIA, INC.,  
VIRGINIA ASSOCIATION OF COUNTIES,  
VIRGINIA MUNICIPAL LEAGUE, AND  
VIRGINIA SCHOOL BOARD ASSOCIATION  
SUPPORTING RESPONDENTS**

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January 31, 2013

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## QUESTION PRESENTED

May the sovereign Commonwealth of Virginia permissibly restrict non-citizens' ability to demand that government officials identify and produce public records?

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## INTERESTS OF THE *AMICI*

*Amici* are the Local Government Attorneys of Virginia, Inc., the Virginia Association of Counties, the Virginia Municipal League, and the Virginia School Boards Association.<sup>1</sup>

The **Local Government Attorneys of Virginia, Inc.** ("LGA") is a non-profit non-stock corporation formed and existing under the laws of the Commonwealth of Virginia. Its active members include the cities, counties, towns, and school districts of the Commonwealth of Virginia. For more than 35 years, LGA has worked to improve the expertise and professionalism of the attorneys who represent local governments. The Virginia General Assembly and

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<sup>1</sup> Pursuant to Rule 37.3 of the Rules of this Court, letters of consent to the filing of this brief have been submitted to the Court. Pursuant to Rule 37.6 of the Rules of this Court, counsel for *amici* state that no counsel for either party to this matter authored the brief in whole or in part. Further, no persons or entities, other than *amici* and their counsel, contributed monetarily to the preparation or submission of this brief. Henrico County, as an active member of LGA, and the Commonwealth of Virginia, as an associate member of LGA, pay regular dues to LGA, which are used for its general operating expenses, but they have not earmarked or otherwise designated any of their dues to fund preparation or submission of this brief. Henrico County is also a dues-paying member of both VACo and VML, which dues are used for the general operating expenses of those *amici*, but none of those dues are earmarked or otherwise designated to fund preparation or submission of this brief.

agencies of the Commonwealth regularly ask LGA to offer legal advice on matters of state policy and to recommend knowledgeable attorneys to serve on legislative study committees and commissions. LGA promotes the continuing legal education of local government attorneys, provides information to those local government attorneys to enable them better to perform their duties, provides a forum for the exchange of ideas and experience, and on occasion initiates, supports, or opposes legislation of significance to local governments.

**The Virginia Association of Counties (VACo)** is a non-profit non-partisan statewide association organized in 1934 for the purpose of representing, promoting, and protecting the interests of its member counties. Pursuant to Va. Code Ann. § 15.2-1303, VACo is an instrumentality of the 94 Virginia counties that comprise its membership.

**The Virginia Municipal League (VML)** is an association of political subdivisions of the Commonwealth of Virginia, formed and maintained pursuant to Va. Code Ann. § 15.2-1303 for the purpose of promoting the interest and welfare of its members as may be necessary or beneficial. VML consists of 39 cities, 156 towns, and 10 counties. VML is an instrumentality of its member political subdivisions.

**The Virginia School Boards Association (VSBA)** is a voluntary non-partisan organization whose

primary mission is the advancement of K-12 education in Virginia. VSBA promotes the quality of education by providing services to every local school board in Virginia. The association and its members have a strong interest in the effective implementation of school board policies, including policies that implement the constitutional authority of local school boards to efficiently and effectively govern their school divisions.

*Amici's* active members receive and respond to requests under the Virginia Freedom of Information Act (VFOIA), Va. Code Ann. §§ 2.2-3700 to 2.2-3714, on a daily basis. Those requests concern every facet of local government. By virtue of their daily processing of VFOIA requests, they are more familiar with VFOIA than any other entity or group.

These members administer and comply with VFOIA, while at the same time carrying out their other important assigned governmental functions. LGA, VACo, VML, and VSBA have a strong interest in upholding all provisions of VFOIA, and thus file this brief in support of the Respondents, urging affirmance of the Court of Appeals for the Fourth Circuit's unanimous ruling that the challenged portions of VFOIA are constitutional.



## SUMMARY OF ARGUMENT

*Amici* urge this Court to affirm the unanimous decision of the Court of Appeals, holding that VFOIA's reasonable restrictions on access to the public records of the Commonwealth and its local governments do not violate the United States Constitution.

VFOIA is aimed at providing information and educating Virginia's citizens. Its purpose is to "ensure[] *the people of the Commonwealth* [have] ready access to public records." Va. Code. Ann. § 2.2-3700(B) (emphasis added). It implicates no fundamental right under the Privileges and Immunities Clause. U.S. Const. art. IV, § 2.

VFOIA is in no way targeted at any sort of business or commercial venture; it regulates no profession or common calling. Instead, it reflects the Virginia General Assembly's careful statutory balancing of its citizens' interest in open government with the substantial and compelling interest of the Commonwealth in providing efficient and effective governmental services.

Because VFOIA is not an economic regulation, it does not implicate the dormant Commerce Clause of the United States Constitution. Thus, the mere fact that Petitioner Hurlbert has chosen to try to make a living requesting and then selling certain data

acquired from freedom of information law requests does not mean that VFOIA is constitutionally infirm.

## ARGUMENT

- I. **No fundamental right recognized under the Privileges & Immunities Clause of the United States Constitution requires government employees to search for, and produce, all records of a government upon request by any person.**

Petitioners assert a fundamental right under the Privileges & Immunities Clause to require state and local government employees to search for, and produce, certain records maintained by those governments. Petitioners, one of whom is a paid plaintiff, Cir. Ct. App. 71A, 72A, and 100A, assert that this right belongs to every person. The asserted right comes in the context of requests from two out-of-state citizens to Virginia governments to compile, and mail to the requesters, local tax assessment records and documents dealing with a state agency's policies regarding child support allegedly due a requester. Cir. Ct. App. 11A at ¶¶ 11-12, 12A at ¶¶ 15-16, 36A at ¶¶ 11 and 15, and 47A at ¶ 5.

**A. Fundamental rights protected by the Clause are limited to those rights of longstanding duration and of crucial importance to the existence of the Union.**

The Privileges and Immunities Clause of the Constitution protects a very limited set of fundamental rights. Fundamental rights are those that are "sufficiently basic to the livelihood of the Nation," *Baldwin v. Fish & Game Comm'n of Mont.*, 436 U.S. 371, 388 (1978), and are "important to the 'maintenance or well-being of the Union,'" *Supreme Court of N.H. v. Piper*, 470 U.S. 274, 281 (1985) (quoting *Baldwin*, 436 U.S. at 388)).

For 190 years, it has been well established that "sufficiently basic" rights are confined to those belonging "to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign." *Corfield v. Coryell*, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823) (No. 3,230).<sup>2</sup>

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<sup>2</sup> To the extent that *Corfield* is read to inquire about rights in "free governments" outside the United States, the spread of freedom of information laws internationally is even more recent than their emergence in the United States, discussed *infra*. Nearly half of the world's existing comprehensive freedom of information acts have been adopted within the past fifteen or so years. David Banisar, *Privacy Int'l, Freedom of Information Around the World 2006: A Global Survey of Access of Government Information*

With respect to such fundamental rights, this Court has said that the Clause forbids only citizenship distinctions that “hinder the formation, the purpose, or the development of a single Union of those States.” *Baldwin*, 436 U.S. at 383.

The Clause does not require that every privilege, immunity, or right that a state affords its citizens must be provided to citizens of all other states. “Special privileges enjoyed by citizens in their own States are not secured in other States by this provision.” *Paul v. Virginia*, 75 U.S. (8 Wall) 168, 180 (1868). States are lawfully permitted to provide their citizens or bona-fide residents with “special privileges” in a whole host of areas, including the ability to plant oysters in the tidewaters of a state, *McCready v. Virginia*, 94 U.S. 391, 397 (1876); the ability to hunt elk for a reduced fee, *Baldwin*, 436 U.S. at 388; the ability to take part in a state-administered program providing financial assistance toward the pursuit of a professional education, *Kuhn v. Vergiels*, 558 F. Supp. 24, 28 (D. Nev. 1982); and discounted tuition at in-state public schools, *Johns v. Redeker*, 406 F.2d 878, 883 (8th Cir. 1969), *cert. denied sub nom. Twist v. Redeker*, 396 U.S. 853 (1969) (rejecting Privileges & Immunities challenge

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Laws at 6 (2006), [http://www.freedominfo.org/documents/global\\_survey2006.pdf](http://www.freedominfo.org/documents/global_survey2006.pdf). Thus, in light of this “growing recognition” of freedom of information policies, *id.* at 8–9, it cannot fairly be said that a basic right of access to all public records has existed for all persons in democratic societies.

to higher tuition for nonresidents). *See also Vlandis v. Kline*, 412 U.S. 441, 442, 452–53 (1973) (although not ruling on constitutionality of higher non-resident tuition and fee rates, recognizing state's right to allow "its own bona fide residents to attend [public colleges and universities in the state] on a preferential tuition basis").

**B. No blanket right of access by all persons to public records has been long-recognized, regardless of the persons' interest in the records; instead, the several states and federal government have crafted differing access laws.**

There is no longstanding right of all persons to access public records. Petitioners point to no broad common-law right that forces governmental bodies to stop their ordinary functions and respond to a host of requests for records.

The histories of Virginia and the United States show that, while relatively broad freedom of information laws have been determined by modern legislatures to be important, they do not meet the tests enunciated in *Corfield* and *Baldwin*. Regardless of the desirability or wisdom of freedom of information laws in today's society, the broad-ranging right asserted by Petitioners is not a right of long existence.

Virginia's right of access to public records is a statutory right created through the legislative



process. Although Virginia is one of the original colonies and has a long and storied history, VFOIA was not enacted until 1968, 1968 Va. Acts ch. 479, two years after the federal government first enacted its own freedom of information law, Pub. L. No. 89-554, 80 Stat. 378 (1966), and nearly 200 years after adoption of the United States Constitution.<sup>3</sup>

Before the federal freedom of information law was passed, “[p]revailing law . . . offer[ed] citizens no clear avenue of access” to information from many federal agencies. Wendy R. Ginsberg, Cong. Research Serv., Access to Government Information In the United States at 1 (2009), <http://fas.org/>

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<sup>3</sup> Moreover, the Tenth Amendment of the United States Constitution reserves to Virginia and its citizens the power to define the breadth and contours of its freedom of information law. U.S. Const. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”). “The allocation of powers in our federal system preserves the integrity, dignity, and residual sovereignty of the States.” *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011). VFOIA is a “respon[se], through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times . . . .” *Id.* “In providing for a stronger central government, . . . the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States.” *New York v. United States*, 505 U.S. 144, 166 (1992). “[T]he Court has consistently respected this choice,” *id.*, and the Court should afford the same respect to the Virginia General Assembly’s public records and open government policy as expressed through VFOIA.

sgp/crs/secretcy/97-71.pdf. The federal freedom of information act was “the first law requiring public access to executive branch information” and was enacted in response to limitations on access. *Id.* at 2.

Various state legislatures have conducted balancing acts to craft their respective freedom of information laws. That balancing establishes certain burdens and requirements on governmental bodies in an effort to help ensure an informed citizenry, while imposing reasonable limitations on the requests for public records.

The rights granted by VFOIA and similar laws in other states and at the federal level are products of the legislative process. The various states differently define which “public records” are subject to production under such freedom of information acts. Andrea G. Nadel, Annotation, *What are “Records” of Agency Which Must be Made Available Under State Freedom of Information Act*, 27 A.L.R.4th 680 §2[a] (1984) (noting that “definitions of ‘public records’ as contained in state freedom of information acts vary widely”); Burt A. Braverman & Wesley R. Heppler, *A Practical Review of State Open Records Laws*, 49 Geo. Wash. L. Rev. 720, 722, 733–36 (1981) (recognizing that “each state FOI law differs in varying degree from both the federal law and other state FOI statutes”). For example, the real estate assessment data sought by Hurlbert, Cir. Ct. App. 12A at ¶¶ 15–16 and J.A. 47A at ¶ 5, might or might not be a “public record,” depending on the specific contours of his request and a particular

state's definition of "public records." *Compare DeLia v. Kiernan*, 293 A.2d 197, 198 (N.J. Super. Ct. App. Div. 1972) (holding that property record cards possessed by tax assessor were not public records, although citizen with pending tax appeal had "sufficient interest" to examine them), *with Attorney General v. Board of Assessors of Woburn*, 378 N.E.2d 45, 46–47 (Mass. 1978) (concluding that field assessment cards were public records required to be disclosed under state's public records law). Those differences support the argument that there is no longstanding "fundamental right" of access to "public records," however defined.

Many states did not enact freedom of information laws until the 1970s, after passage of VFOIA. *Freedom of Information in the United States*, SunshineReview.org, [http://sunshinereview.org/index.php/Freedom\\_of\\_Information\\_in\\_the\\_United\\_States](http://sunshinereview.org/index.php/Freedom_of_Information_in_the_United_States) (last visited Jan. 21, 2013) ("A number of states passed their open records legislation in the 1970s in the wake of Watergate."). Even the modern freedom of information laws like VFOIA contain a wealth of ever-growing exceptions. *See Swift v. Campbell*, 159 S.W.3d 565, 571–72 (Tenn. Ct. App. 2004) (noting increasing number of specific exemptions and exceptions added to Tennessee Public Records Act); W. Wat Hopkins, *Mass Communication Law in Virginia* 92 (2nd ed. 1999) (recognizing that FOIA "is becoming increasingly complex as lawmakers attach provisos, limitations and exceptions"). As recently as about 30 years ago,

at least a third of the states had citizens-only restrictions in their freedom of information statutes. *See Braverman & Heppler, supra*, at 727.

Prior to the enactment of state laws, common-law rights "sometimes allowed inspection by the public of all public records, sometimes bestowed such privileges only on a limited class of persons, and other times opened only specific types of documents to public view," but generally required demonstrable interest and applied only to records "required to be kept" by state law. *Id.* at 723. Such restrictions "place[d] many documents beyond the common-law reach." *Id.* at 724.

The differences between states' understanding of access rights, both at common law and statutorily today, underscore that the right of access to records is not a fundamental one. Even jurisdictions that recognized a common-law right to access limited such a right to those persons with a demonstrable interest in the matter, not the broad right of unfettered access asserted by appellants. *See C. v. C.*, 320 A.2d 717, 723-24 (Del. 1974) (finding no absolute right of public to inspect public records); *Excise Comm'n of Citronelle v. State ex rel. Skinner*, 60 So. 812, 813 (Ala. 1912) ("[T]he public generally have no absolute right of access or inspection. And one who demands that right can be properly required to show that he has an interest in the document which is sought, and that the inspection is

for a legitimate purpose.”). *See also* Nadel, *supra*, §2[b] (“[A]t common law, a person requesting inspection of a public record was required to show an interest therein which would enable him to maintain or defend an action for which the document or record sought could furnish evidence or necessary information . . .”).

These requirements of particularized interests at common law are consistent with the citations provided by Petitioners. *See Clay v. Ballard*, 13 S.E. 262, 262–63 (Va. 1891) (concluding that a “legally qualified voter . . . having an interest in” voter registration books may inspect and copy them); *Preston v. Bowen*, 20 Va. (6 Munf.) 271, 272 (1819) (finding plaintiff who requested surveys recorded in county surveyor’s office “for the purpose of enabling him to enter and locate the lands circumscribed and included by the said surveys” entitled to receive same).

This historical backdrop shows that the right asserted by Petitioners is not a longstanding one, not being one which has “at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign.” *Corfield* 6 F. Cas. at 551. Rather, the increase in open government laws underscores that the right of access is a relatively recent one, perhaps spurred by the policy goals identified by Petitioners and their *amici*. However,



modern public policy does not create a fundamental right.

VFOIA's restriction on the scope of requesters—Virginia citizens and members of the media—is a reasonable limitation adopted by the Virginia General Assembly. Other states have chosen other limitations, including Arizona and Rhode Island's attempts to limit the use of public records for commercial purposes such as those advanced by Petitioner Hurlbert. *See* Ariz. Rev. Stat. Ann. § 39-121.03 (2012); R.I. Gen. Laws § 38-2-4(e) (2012). These and other restrictions underscore that modification of freedom of information laws is best handled by legislative initiative rather than by judicial declaration of a heretofore unknown “fundamental right.”

**C. A wholesale right of access is not crucial to the existence and continuation of the country as a whole.**

The ability of a resident of California to obtain copies of real estate assessment data of Henrico County, Virginia does not “bear[] on the vitality of the Nation as a single entity.” *Piper*, 470 U.S. at 279 (*quoting Baldwin*, 436 U.S. at 383). The ability of a Rhode Islander to obtain copies of child support agency policy documents does not threaten the continuance of the country. The inability of Virginia citizens to acquire similar documents from other

states also would not call into question whether the country can survive as a cohesive entity.

Not every state law that has some effect on another state can be fairly considered to affect the vitality of the Union. The test is much higher than that, and does not depend on whether a business interest is present. *Baldwin* in fact involved a hunting guide who offered his services to customers who were the out-of-state plaintiffs in the case. 436 U.S. at 372. Yet, the guide's commercial interest was not considered by the Court to convert a personal interest in the activity of hunting elk into one that implicated the very ability of the United States to function as one entity. Only state laws imposing burdens so great that enforcement of those laws would shatter the unity of our country meet that test.

In-state tuition benefits, a common feature throughout the country, have not caused the Union to fail. These benefits reflect a policy similar to that of VFOIA—that state citizens, who provide tax dollars to support state institutions, ought to have preferential benefit from those institutions. Likewise, residency-based restrictions on public employment have not caused the Nation to cease functioning as a single unit. *See Salem Blue Collar Workers Ass'n v. City of Salem*, 33 F.3d 265, 269–70 (3d Cir. 1994), *cert. denied*, 513 U.S. 1152 (1995) (rejecting claim that city ordinance requiring

municipal employees to reside in city was fundamental right implicating Privileges and Immunities Clause). As noted earlier, until about 30 years ago, a significant number of states imposed citizenship limitations on access to public records, *see Braverman & Heppler, supra*, at 727, and the Union withstood those many years.

In light of such permissible preferences and limitations, it cannot be said fairly that a broad right to access public documents was a right contemplated by the Founding Fathers that is required to maintain the unity of the United States.

## II. VFOIA does not implicate the dormant Commerce Clause because it is not a regulation of commerce.

The dormant Commerce Clause is concerned with “economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.” *Department of Revenue of Ky. v. Davis*, 553 U.S. 328, 337–38 (2008) (citing *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273–74 (1988)). The purpose of the Clause is “to ‘prevent a State from retreating into . . . economic isolation.’” *Davis*, 553 U.S. at 338 (quoting *Fulton Corp. v. Faulkner*, 516 U.S. 325, 330 (1996)).

As the Court has recognized, states and local governments have the responsibility to protect their citizens’ health, safety, and welfare. *Davis*, 553 U.S.

at 340. In fact, this is one of the primary objectives and most important functions of state and local government, and “laws favoring . . . States and their subdivisions may ‘be directed toward any number of legitimate goals unrelated to protectionism.’” *Id.* (quoting *United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 343 (2007)). This principle applies when a statute or ordinance addresses a subject that is “both typically and traditionally a [state or] local government function.” *Id.* (quoting *United Haulers*, 550 U.S. at 344). By its very nature, providing access to state or local records is, to the extent such access is afforded, traditionally and exclusively a function of the state or local government that is the custodian of those records. VFOIA is concerned only with this traditional government function, and seeks to inform citizens, in part to help those citizens protect their welfare.

“[A] government function is not susceptible to standard dormant Commerce Clause scrutiny owing to its likely motivation by legitimate objectives distinct from the simple economic protectionism the Clause abhors.” *Davis*, 553 U.S. at 341 (citing *United Haulers*, 550 U.S. at 343). Like waste disposal, *United Haulers*, 550 U.S. at 344, and issuance of municipal bonds, *Davis*, 553 U.S. at 341–42, public records access is a “quintessentially public function.” *See Davis*, 553 U.S. at 341–42.

The Virginia General Assembly, in enacting VFOIA, was motivated by the legitimate objective to "ensure[] the people of the Commonwealth ready access to public records in the custody of a public body or its officers and employees," because "[t]he affairs of government are not intended to be conducted in an atmosphere of secrecy since at all times the public is to be the beneficiary of any action taken at any level of government." Va. Code. Ann. § 2.2-3700(B). This goal, which recognizes that Virginia citizens are the beneficiaries and watchdogs of Virginia state and local governmental activities, bears no relation to economic protectionism.

VFOIA does not come within the scope of the dormant Commerce Clause. Its reasonable limitations on public records access effect no forbidden discrimination, because VFOIA addresses a traditional government function and has the legitimate, non-economic objective of promoting open government.

**III. The Virginia General Assembly has made the permissible policy decision that VFOIA should benefit the citizens who bear the burden of its unrecoverable costs.**

By its express language, VFOIA is intended to benefit "the people of the Commonwealth." Va. Code. Ann. § 2.2-3700(B). As such, "citizens of the Commonwealth" are guaranteed access to non-



exempt public records. *Id.* § 2.2-3704(A).<sup>4</sup> However, the Virginia General Assembly has vested discretion in the public bodies that administer VFOIA to deny certain requests, including requests from non-citizens of Virginia. *Id.* § 2.2-3704(B)(1); *see id.* § 2.2-3700(B) (“Unless a public body or its officers or employees specifically elect to exercise an exemption provided by this chapter or any other statute, . . . all public records shall be available for inspection and copying upon request.”).

Public bodies may not recoup all of the costs of responding to VFOIA requests. Section 2.2-3704(F) allows public bodies to “make reasonable charges not to exceed [their] *actual cost* incurred in accessing, duplicating, supplying, or searching for the requested records.” *Id.* (emphasis added). However, public bodies are not permitted to “recoup the general costs associated with creating or maintaining records or transacting the general business of the public body,” *id.*, even when these costs are “actual costs” of responding to VFOIA requests. Thus, many of the costs that public bodies necessarily incur in complying with VFOIA are not recoverable from requesters.

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<sup>4</sup> The Virginia General Assembly has also guaranteed access to a broad swath of media entities, being all “representatives of newspapers and magazines with circulation in the Commonwealth[] and representatives of radio and television stations broadcasting in or into the Commonwealth,” *id.* § 2.2-3704(A), which access is not at issue in this case.

The Virginia Freedom of Information Advisory Council (the "Council"), *see id.* §§ 30-178(A) and 30-179(1) (empowering the Council to "[f]urnish, upon request, advisory opinions or guidelines, and other appropriate information regarding the Freedom of Information Act"), has interpreted § 2.2-3704(F) to permit public bodies to make reasonable charges for the actual cost of staff time expended in responding to a request. *See* 2001 Virginia Freedom of Information Advisory Opinion 21 (Mar. 27, 2001), [http://foiacouncil.dls.virginia.gov/ops/01/AO\\_21.htm](http://foiacouncil.dls.virginia.gov/ops/01/AO_21.htm). The Council recognizes that "[c]learly there are other actual costs to a public body for creating and maintaining public records as well as 'overhead' costs such as rent, utilities, and equipment." 2002 Virginia Freedom of Information Advisory Opinion 05 (May 24, 2002), [http://foiacouncil.dls.virginia.gov/ops/02/AO\\_05.htm](http://foiacouncil.dls.virginia.gov/ops/02/AO_05.htm).

Though a responding employee's salary may be recoverable, costs related to that employee's benefits are not, as the Council classifies benefits as "a general cost associated with transacting the general business of the public body." *Id.* (citing Va. Code Ann. § 2.2-3704(F)). Other unrecoverable costs include "the time of people supervising those that responded to the request" and time spent "explaining or discussing disputed charges." 2004 Virginia Freedom of Information Advisory Opinion 04 (Mar. 19, 2004), [http://foiacouncil.dls.virginia.gov/ops/04/AO\\_04\\_04.htm](http://foiacouncil.dls.virginia.gov/ops/04/AO_04_04.htm). The net effect of all these provisions

is that the base salary for a lower-level employee's time searching for and responding to a request may be recoverable, but benefits, and the salaries of others who review and analyze requests, such as lawyers and supervisors, are not.

Though substantial public resources must be diverted to respond to each request, public bodies cannot directly recover all "actual costs" expended in responding to requests. The citizens of Virginia bear the general costs associated with transacting the general business of local government entities in Virginia. Through their tax dollars, Virginia citizens pay for the unrecoverable "actual costs" and overhead costs of VFOIA compliance. The Virginia General Assembly has made a legitimate legislative decision to limit the benefits of VFOIA to the very people whose tax dollars directly support the unrecoverable costs of VFOIA compliance—Virginia citizens.

This limitation operates on the same premise as domicile requirements for in-state tuition at Virginia's public colleges and universities, Va. Code Ann. § 23-7.4, and residency restrictions for voting in Virginia's elections, *id.* §§ 24.2-101 and 24.2-400, or obtaining a Virginia motor vehicle operator's license, *id.* § 46.2-323.1. In each of these cases, citizens of the Commonwealth are the beneficiaries of government functions but also must bear the burden of their costs. These are not examples of

discrimination in favor of Virginia citizens or against non-citizens; they are simply transactions of the general business of the Commonwealth and its political subdivisions, for which Virginia citizens pay the general costs. *See* Va. Code Ann. § 2.2-3704(F).

The Virginia General Assembly, which sets the public policy of the Commonwealth, has made a valid legislative decision to place certain limitations on VFOIA, including limiting the pool of requesters. The statute's current structure and limitations ensure that those who benefit from VFOIA also bear the burden of its unrecoverable costs of compliance. If VFOIA were expanded to allow requests by anyone, the citizens of Virginia would bear an increased burden while deriving no additional benefit from the law. The public bodies serving these citizens would spend more in taxpayer money and public employees' time in responding to VFOIA requests, and the citizens who fund and rely upon government services would suffer from public bodies' decreased efficiency and increased costs.

VFOIA embodies the public policy of the Commonwealth that government affairs should be conducted in the open to the greatest practicable extent. Where other interests weigh against this policy, the General Assembly has created discretionary exemptions that public bodies may invoke to deny a request. *See* Va. Code Ann. § 2.2-3700(B) (providing that records exemptions are

discretionary); *see, e.g., id.* §§ 2.2-3705.1 to 2.2-3705.7 (describing exemptions that apply to certain categories of records). On a daily basis, public bodies, such as those that compose *amici*, weigh these competing interests, much as they do when making other decisions that affect citizens' health, safety, and welfare (*e.g.*, zoning, budgeting, provision of utilities, school lunch menus). While Petitioners and their *amici* may wish that the General Assembly had made different policy decisions, the fact remains that the method it chose is within its discretion. "That [Virginia] might have furthered its underlying purpose more artfully, more directly, or more completely, does not warrant a conclusion that the method it chose is unconstitutional." *Baldwin*, 436 U.S. at 390 (quoting *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 813 (1976)).

**IV. Data from Virginia's public bodies provides support for the Virginia General Assembly's policy decision to include reasonable limitations on public records access.**

*Amici* include local government entities of various types and sizes across Virginia, all of which must comply with VFOIA. Many of them are small, and they all have limited budgets from which to hire employees. Many of the entities still maintain many of their records in paper format, which must be searched manually to determine whether they are responsive to a VFOIA request.



The governments all have only a certain amount of time in which to perform the necessary and proper functions of government. Each minute spent on a VFOIA request for an out-of-state citizen is a minute that cannot be spent on a VFOIA request from a Virginia citizen, or on providing other important governmental services to Virginia citizens who fund the state and local government. VFOIA compliance, which must be accomplished within short time limits, Va. Code Ann. § 2.2-3704(B), imposes burdens on them that are not insignificant, including unrecoverable costs.

A wide range of local government entities supplied the following information about the realities and challenges of compliance with VFOIA as it is currently written. This data provides helpful context about how the statute functions and shows how an increase in its scope would increase the burdens on both the public bodies who administer it and the Virginia citizens who fund it.

#### **A. City of Virginia Beach**

Virginia Beach is the largest city in Virginia, with a population of 437,994. Weldon Cooper Center for Public Service, 2010 Census Data (Jan. 30, 2012), [http://www.coopercenter.org/sites/default/files/node/13/July\\_2011\\_PopulationEstimates\\_UVACooperCenter-rev.xls](http://www.coopercenter.org/sites/default/files/node/13/July_2011_PopulationEstimates_UVACooperCenter-rev.xls). The Virginia Beach City Attorney's Office operates a Freedom of Information Office, Mark D. Stiles, City Attorney's Office for City of Va. Beach,

2011 Annual Report at 4 (Jan. 31, 2012), <http://www.vbgov.com/government/departments/city-attorney/Documents/2011annualreport.pdf>, and maintains annual records of its VFOIA compliance.

From 2008 to 2011, an average of nearly 600 requests were processed through the Office each year, with almost 27,000 documents copied and provided each year. *Id.* at 8; Mark D. Stiles, City Attorney's Office for City of Va. Beach, 2010 Annual Report at 8 (Jan. 31, 2011), <http://www.vbgov.com/government/departments/city-attorney/Documents/2010annualreport.pdf>; Mark D. Stiles, City Attorney's Office for City of Va. Beach, 2009 Annual Report at 6 (Jan. 29, 2010), <http://www.vbgov.com/government/departments/city-attorney/Documents/2009annualreport.pdf>; Leslie L. Lilley, City Attorney's Office for City of Va. Beach, Fiscal Year 2008 Annual Report at 2 (2008), <http://www.vbgov.com/government/departments/city-attorney/Documents/2008annualreport.pdf>. The Office facilitated the inspection of thousands more documents each year.

## **B. School Board of City of Hampton<sup>5</sup>**

The City of Hampton School Division has approximately 21,000 students. It employs one public relations officer who also serves as VFOIA officer, exercising primary responsibility for reviewing VFOIA requests. In some circumstances, the School Board Attorney also becomes involved in reviewing those requests. From July 2011 to October 2012, she participated in the review of 34 requests. Of these, three were identifiable as coming from an out-of-state requester. Seven of the requests came from the same household. Eleven more came from requesters who identified themselves as members of various media outlets.

Documents were provided in response to twenty of the 34 requests. Three requests were denied because they came from out-of-state requesters. Three requests were for information already available online. Estimates were provided for two requests, and the requesters did not respond. For five requests, no documents were available. One request was revised before documents were provided.

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<sup>5</sup> See Sheri A. Hiter, *Summary of Reported Local Government VFOIA Data*, 38 Bill of Particulars: The Reporter of the Local Government Attorneys of Virginia, Inc. 315 (Steven G. Friedman ed., Dec. 2012) (summarizing VFOIA data from School Board of City of Hampton, Virginia).

### C. Town of Purcellville<sup>6</sup>

The Town of Purcellville, with a population of about 7,727, *see* Town of Purcellville, 2011 Comprehensive Plan Update at 1, [www.purcellvilleva.gov/DocumentView.aspx?DID=2084](http://www.purcellvilleva.gov/DocumentView.aspx?DID=2084), receives approximately 150 to 200 requests per year. Ninety percent of these come from the same small group of requesters.

The Town Attorney spends approximately half her time responding to VFOIA requests, displacing other legal tasks and Town business. While the Town is able to recover the costs of copying and some staff time spent preparing responses, it also incurs thousands of dollars a year in unrecoverable overhead costs. The sheer volume of requests and the time spent to research and respond make VFOIA compliance a substantial burden for the Town.

### D. Accomack County<sup>7</sup>

Accomack County has a population of 33,164, *see* Cooper Center, *supra*. A typical VFOIA request presented to the County asks for all documents regarding:

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<sup>6</sup> *See id.* at 316 (summarizing VFOIA data from Town of Purcellville, Virginia).

<sup>7</sup> *See id.* at 316 (summarizing VFOIA data from Accomack County, Virginia).

the indexes that reflect and/or the written proffers the governing body of Accomack County and/or the Accomack County Board of Supervisors has proffered since 1634 to date . . . that says what form of County government Accomack County operates under.

The requester responsible for this request made more than a dozen requests in 2012 alone. Several of these requests exceeded fifty pages in length, with a few spanning more than one hundred pages. The Office of the County Attorney expends considerable time dealing with these frequent, burdensome requests.

#### **E. Chesterfield County<sup>8</sup>**

Chesterfield County has about 316,236 residents, *see* Cooper Center, *supra*, making it the fourth largest municipality in Virginia. The Assistant County Attorney has handled VFOIA requests for the County for 25 years. He identifies requests to which VFOIA exemptions might apply; reviews requests that, due to their scope, may require lengthy search time or high cost of compliance; and reviews requests dealing with controversial issues in the County. On average, he spends about five to six hours per week on this task. This function takes up

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<sup>8</sup> *See id.* at 316–17 (summarizing VFOIA data from Chesterfield County, Virginia).



a significant and increasing portion of his time. As compared to five or six years ago, VFOIA requests make up three to five times as much of his workload.

Routine requests are often handled directly by individual departments. The Assistant County Attorney handles non-routine requests, and these more complicated matters amount to approximately eight to ten requests per week. He also handles all requests that come into the County's Police Department and its Emergency Communications Center, amounting to eight to twelve requests per week (or about 40 to 50 per month), and these are generally routine.

When the Assistant County Attorney determines that a request seeks non-exempt information, he directs the appropriate department to generate the relevant records. Department staff retrieve files from storage and consult with other employees who might have responsive documents. For the Police Department in particular, employees may spend two or three times as much time compiling responsive documents as the Assistant County Attorney spends initially reviewing requests.

The County at times receives requests from out-of-state requesters, which can be divided into four main categories. First are "due diligence" requests, which ask for documents such as code compliance information about in-state real property that an individual seeks to purchase. These documents are

typically provided, as the requester has a personal interest in the subject matter. Second are requests from out-of-state data mining companies asking for entire categories of data, such as all building permits for a certain time period. These requests are denied under the citizens-only provision. Third are "status requests" on items like outstanding bonds, escrow funds, or letters of credit held by the County. These are denied under the citizens-only provision. Finally, some requests are more specific, *e.g.*, a party to a child custody dispute asking about 911 calls to a particular residence, or an out-of-state police department seeking arrest records for an applicant for employment. Non-exempt documents are generally provided to these requesters, who demonstrate an individualized interest in the subject.

#### **F. Warren County<sup>9</sup>**

Warren County, with about 37,575 citizens, *see* Cooper Center, *supra*, provided available VFOIA data from 2007 through October 2012. Routine VFOIA requests are generally handled by County departments themselves and are not tracked by the Office of the County Attorney.

A small number of requesters submit frequent requests for broad categories of documents. In 2007,

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<sup>9</sup> *See id.* at 317–18 (summarizing VFOIA data from Warren County, Virginia).

the County Attorney dealt with five requests from the same citizen. One request asked for about 11,500 emails, but it was abandoned after the requester learned of the estimated charge. The County received three requests in 2009, including one broad request encompassing 6,908 pages of responsive documents. 2010 brought six requests, 2011 saw eight requests, and in the first ten months of 2012, ten requests were received.

From 2007 to 2010, one requester made seven requests, accruing \$46.55 in unpaid charges, and another made two requests, accumulating an unpaid bill of \$377.43. Further requests from these individuals were denied for nonpayment. However, this requires the County Attorney to track all outstanding charges, disseminate this information to County departments, and cross-reference this list against new requests received. These VFOIA payment records have themselves been the subject of VFOIA requests.

The County was involved in a lengthy lawsuit dealing with Department of Social Services VFOIA requests from 2007 to 2011. These requests required production of four boxes of documents. Department staff were pulled away from other duties to identify which documents were responsive and then to compile and redact these documents. Information technology (IT) staff from three different public bodies were needed to retrieve electronically stored

documents. Thousands of pages of documents had to be copied, and a location had to be arranged for inspection of other records. The County Attorney spent hours in court and preparing for court. Unrecoverable expenses for this litigation were in the thousands of dollars, including copy costs, staff time, court time, meetings, searches by IT personnel, a forensic search performed by the Sheriff's Office, and attorney fees for the services of outside counsel.

Warren County has no dedicated VFOIA officer. Employees from the various departments must take time away from other job duties to retrieve and compile documents. The County Attorney's other job functions are displaced while he reviews requests, collects responses from other departments, and coordinates with IT personnel for the retrieval of electronic documents. He is also responsible for training the departments on proper response procedures, including how to estimate costs before sending out large responses.

Requests frequently span several departments, requiring the County Attorney and other employees to expend additional time corresponding, coordinating, collecting, and compiling data under time pressure. Because multiple departments are involved, it is difficult to track requests, responses, and payment of charges, and the Office of the County Attorney does not have the manpower to handle all requests itself. Moreover, most

departmental jobs require public availability and involve constant interruption (*e.g.*, answering phones, staffing front desks), which complicates employees' ability to track time spent on responses.

The foregoing local government data illustrates the already-significant workload that VFOIA imposes on public bodies. It also shows the challenges inherent in VFOIA compliance that result in substantial unrecoverable costs borne by Virginia citizens. While the system is not perfect, the Virginia General Assembly has made a policy determination that, on balance, the benefits to Virginia citizens justify the burdens and occasional misuse of the statute.

Expansion of VFOIA would increase the workload of Virginia's public bodies at the expense of other governmental functions and resources, as well as efficiency. The Virginia General Assembly's valid legislative balancing of the benefits and burdens of Virginia's open records law passes constitutional muster, and its reasonable and well-reasoned limitations should be allowed to stand.

## CONCLUSION

For the foregoing reasons, *amici* respectfully ask this Court to conclude that there is no broad "fundamental right" of access to information in the form of mandatory searches and disclosure of all public records of the Commonwealth and its many



local governments, no matter the identity of the requester, and that Virginia's freedom of information law addresses a traditional government function with legitimate public objectives bearing no relation to the economic protectionism with which the dormant Commerce Clause is concerned. For these reasons, the Court should affirm the judgment of the Court of Appeals.

Respectfully submitted,

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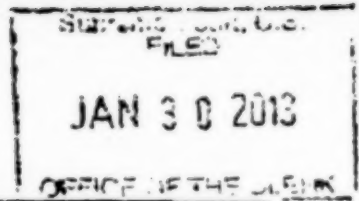
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January 31, 2013

**AMICUS  
CURIAE  
BRIEF**

No. 12-17



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IN THE  
**Supreme Court of the United States**

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MARK J. MCBURNEY AND ROGER W. HURLBERT,  
*Petitioners,*

v.

NATHANIEL L. YOUNG, JR. AND THOMAS C. LITTLE,  
*Respondents.*

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**On Writ of Certiorari to the  
United States Court of Appeals  
for the Fourth Circuit**

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**BRIEF OF THE NATIONAL CONFERENCE  
OF STATE LEGISLATURES, COUNCIL OF  
STATE GOVERNMENTS, INTERNATIONAL  
CITY/COUNTY MANAGEMENT ASSOCIATION,  
AND INTERNATIONAL MUNICIPAL LAWYERS  
ASSOCIATION AS *AMICI CURIAE*  
IN SUPPORT OF RESPONDENTS**

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## **QUESTION PRESENTED**

Under the Privileges and Immunities Clause of Article IV and the dormant Commerce Clause of the United States Constitution, may Virginia grant its citizens access to non-judicial governmental records without providing the same right of access to non-citizens?





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## INTEREST OF *AMICI CURIAE*<sup>1</sup>

*Amici* are national organizations whose members include State, county, and local governments and officials throughout the United States who are responsible for responding to public-record requests. *Amici* urge this Court to protect the States' flexibility to structure their open-records laws to meet their primary purpose of allowing State citizens to see what *their own government* is up to. Because States are not constitutionally required to provide such access to their own citizens, the Court should decline to impose an all-or-nothing rule that would effectively encourage States to provide less public access, not more.

## BACKGROUND

The common law did not recognize a broad right of access to non-judicial governmental records.<sup>2</sup> Since the 1950s, however, all fifty States and the District of Columbia have adopted open-records or "Freedom of Information Act" (FOIA) laws. Their language varies considerably, as States have experimented with the scope of access to provide, exemptions for certain documents, and the extent to which requestors are required to pay the cost of producing the records. In the experience of *amici*, State FOIA laws do not fully reimburse the government for the true cost and

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<sup>1</sup> The parties have consented to the filing of this brief and their letters of consent are on file with the clerk. (Rule 37.2.) This brief was not written in whole or in part by the parties' counsel, and no one other than the *amici* made a monetary contribution to its preparation. (Rule 37.6.)

<sup>2</sup> *Infra* at IV.B.

significant burden imposed in responding to such requests.<sup>3</sup>

Virginia is not the only State to limit public-record access by non-citizens.<sup>4</sup> The same approach is followed in Alabama,<sup>5</sup> Arkansas,<sup>6</sup> Missouri,<sup>7</sup> New Hampshire,<sup>8</sup> New Jersey,<sup>9</sup> and Tennessee,<sup>10</sup> although the Attorneys General of Alabama and New Hampshire have opined that their laws would permit access by any U.S. citizen.<sup>11</sup> Delaware deleted its citizens-only limitation after the Third Circuit ruled it unconstitutional in *Lee v. Minner*, 458 F.3d 194 (3d Cir. 2006).<sup>12</sup> Georgia followed Delaware's example, deleting its citizens-only provision last year as well.<sup>13</sup> Tennessee's citizens-only provision is the subject of pending litigation in the Sixth Circuit.<sup>14</sup>

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<sup>3</sup> *Infra* at II.

<sup>4</sup> VA. CODE ANN. §§ 2.2-3700(B), 2.2-3704(A) (2011).

<sup>5</sup> ALA. CODE § 36-12-40 (2012).

<sup>6</sup> ARK. CODE ANN. § 25-19-105 (2012).

<sup>7</sup> MO. REV. STAT. § 109.180 (2012).

<sup>8</sup> N.H. REV. STAT. ANN. § 91-A:4 (2012).

<sup>9</sup> N.J. STAT. ANN. § 47:1A-1 (2012).

<sup>10</sup> TENN. CODE ANN. § 10-7-503 (2012).

<sup>11</sup> Ala. Op. Att'y Gen. No. 2001-107, 2001 Ala. AG LEXIS 31 (Mar. 1, 2001); N.H. Att'y Gen., NEW HAMPSHIRE'S RIGHT-TO-KNOW LAW 36 n.23 (July 15, 2009), available at <http://www.doj.nh.gov/civil/documents/right-to-know.pdf>.

<sup>12</sup> See 78 Del. Laws ch. 382 (2012), amending DEL. CODE ANN. tit. 29, § 10003 (2012).

<sup>13</sup> 2012 Ga. Laws 218, § 2, amending GA. CODE ANN. § 50-18-70 (2012).

<sup>14</sup> *Jones v. City of Memphis*, 852 F. Supp. 2d 1002, 1011 (W.D. Tenn. 2012), appeal stayed, No. 12-5558 (6th Cir. Dec. 26, 2012).

## SUMMARY OF ARGUMENT

Petitioners overstate the restrictiveness of Virginia's open-records laws by blurring the distinction between judicial and non-judicial records. Virginia's citizens-only provision does not apply to judicial records, which are available to *anyone* who wishes to access them. Such judicial records include real estate title records, judgment liens, tax liens, and financing statements filed under Article 9 of the Uniform Commercial Code. As to non-judicial records, Virginia's Government Data Collection and Dissemination Practices Act gives all persons the right to obtain any records relating to them. Petitioner McBurney used that law to obtain a number of the records that he sought. In addition, the print, radio and television media operating in Virginia may also obtain records under Virginia's FOIA, although the issue of press access is not presented in this case.

Petitioners also understate the cost and burden to government to administer open-records laws. No amount of reimbursement makes up for the fact that government employees responding to open-records requests are unable to spend that time fulfilling the primary governmental mission they were hired to perform. Moreover, Virginia's reimbursement provisions do not compensate for all costs, such as an attorney's time to screen public records for privileged information, or the overhead associated with government employees tasked with searching for records and responding to such requests. Examples abound of uncompensated burdens and abuses of open-records laws. Thus, the Petitioners are incorrect when they argue that there would be no cost or burden to States if the Court required them to open their non-judicial records to everyone as a condition

of making them available to State citizens. *Amici* favor open-records laws. But because the Constitution does not require States to make their non-judicial records available for public inspection at all, the all-or-nothing rule urged by Petitioners could incentivize some States to restrict access to their citizens as well, leading to less openness, not more.

The central purpose of Virginia's open-records law is to enable Virginia citizens to observe their government in operation and to hold their public officials accountable. This Court has made clear that States may properly determine membership in their own political community. Virginia's decision to open its non-judicial records to Virginia citizens so they can see what their own government is up to fits comfortably within that tradition.

Virginia's citizens-only provision does not violate the Privileges and Immunities Clause because the privilege to access the non-judicial records at issue in this case is not a fundamental right. This Court has never recognized a constitutional right to access such records and has upheld government action limiting such access against various constitutional challenges. The common law did not recognize a general right of access to such records either. While parties with an interest in the proceeding were granted rights of access to judicial records, there was no generally recognized right of access to non-judicial records. States in this country reached inconsistent results, showing that the right in question is not fundamental under the long-accepted test set forth by Justice Washington in *Corfield v. Coryell*, 6 F. Cas. 546 (C.C. E.D. Pa. 1823) (No. 3230).

Virginia's citizens-only provision also does not offend the dormant Commerce Clause, as claimed by Petitioner Hurlbert, but not McBurney. The virtually *per se* rule of invalidity—which applies to State laws that facially discriminate against interstate commerce—has no place here. First, as in *Department of Revenue v. Davis*, 553 U.S. 328, 341 (2008), Virginia has exercised a traditional governmental function in determining the extent to which it will make its own governmental records accessible to its citizens, so the standard Commerce Clause doctrine does not apply. Virginia has acted in a traditional governmental role to fulfill its governmental obligations, not to promote the economic interests of citizens over non-citizens. Second, Virginia's citizens-only provision discriminates neither against similarly situated persons nor against interstate commerce. State citizens who fund their government and elect their officials have a stronger interest in seeing what their government is up to compared to non-citizens. So the two types of requestors are not similarly situated. And nothing on the face of Virginia's FOIA suggests it has anything to do with economic considerations at all, let alone giving citizens a competitive economic advantage over non-citizens. Accordingly, the *per se* rule is inapplicable.

The *Pike* balancing test for statutes alleged to unduly interfere with interstate commerce is also inappropriate here. As the Court said in *Davis*, it is unclear whether *Pike* applies at all in cases like this one, where the State acts for the benefit of a government fulfilling governmental obligations, not to advance private commercial interests. What is more, the balancing needed here would, as Justice Scalia observed in *Davis*, require the Court to compare “apples” to “tangerines.” 553 U.S. at 360 (Scalia, J.,



concurring in part). The Court would have to weigh the good-government benefits provided to Virginia and its citizens by Virginia's open-records law against the alleged economic burdens that a citizens-only provision imposes on the national economy, discounting that burden by the risk that Virginia might choose to end her open-access policy altogether were she confronted with the all-or-nothing choice urged by Petitioners.

The Court should preserve the States' flexibility to structure their open-records laws in a manner best suited to serve their primary function: promoting accountability of State government to the citizens it serves.

## ARGUMENT

### I Petitioners overstate the restrictiveness of Virginia's open-records laws.

Virginia's public-record laws are not as restrictive as Petitioners and their *amici* suggest.

First, *judicial* records are not at issue here. Judicial records are "[d]istinguished from government records of the executive or legislative branches."<sup>15</sup> Judicial records, including legal filings and land records, are available in Virginia to *anyone* who wants to inspect or copy them. Virginia law provides that "any records and papers of every circuit court that are maintained by the clerk of the circuit court shall be open to inspection by *any person* . . . ."<sup>16</sup> These

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<sup>15</sup> William Ollie Key, Jr., *The Common Law Right to Inspect and Copy Judicial Records: in Camera or on Camera*, 16 Ga. L. Rev. 659, 660 n.9 (1982).

<sup>16</sup> See VA. CODE ANN. § 17.1-208 (2010) (emphasis added); see *Shenandoah Publ'g House, Inc. v. Fanning*, 368 S.E.2d 253, 258-

documents include real estate title records that are required to be kept by circuit court clerks,<sup>17</sup> judgment liens,<sup>18</sup> tax liens,<sup>19</sup> and financing statements under Article 9 of the Uniform Commercial Code.<sup>20</sup>

Thus, Petitioners are misinformed when they claim that such key documents as “real property records,” title records, “Virginia civil judgments,” and “tax liens” cannot be inspected by non-citizens.<sup>21</sup> It speaks volumes that Petitioners and their *amici* have not offered real-world examples of actual problems associated with accessing records like these in Virginia.

Second, as to *non-judicial* records—those held by executive and legislative branch agencies—Virginia’s Government Data Collection and Dissemination Practices Act<sup>22</sup> grants open-records access to *every* person (not just Virginia citizens) if the governmental record relates to the requestor or “data subject.”<sup>23</sup> Indeed, it is undisputed that Petitioner McBurney

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59 (Va. 1988) (“a rebuttable presumption of public access applies in civil proceedings to judicial records”).

<sup>17</sup> VA. CODE ANN. § 55-106 (2012).

<sup>18</sup> VA. CODE ANN. §§ 8.01-446, 8.01-447 (2007 & Supp. 2012); *see also id.* §§ 55-138 to 55-141 (2012).

<sup>19</sup> *E.g.*, VA. CODE ANN. §§ 58.1-314, 58.1-908, 58.1-1805, 58.1-2021, 58.1-3172 (2009) (requiring various tax liens to be recorded in circuit court); *see also id.* § 55-142.1 (2012) (requiring federal tax liens to be recorded in circuit court).

<sup>20</sup> VA. CODE ANN. § 8.9A-501(a)(1) (2001).

<sup>21</sup> Pet’rs’ Br. 2-3, 34; Brief for the Coalition for Sensible Public Records Access as Amici Curiae Supporting Petitioners at 18-19 (same).

<sup>22</sup> VA. CODE ANN. §§ 2.2-3800 through 2.2-3809 (2011 & Supp. 2012).

<sup>23</sup> VA. CODE ANN. § 2.2-3806(A)(3) (2011).

obtained a number of such records by using that statute. (4th Cir. J.A. 36A-37A.)

And third, Virginia's FOIA grants access to print, radio, and television media whose publications or broadcasts reach into Virginia, even if the request comes from out of state.<sup>24</sup> One can debate as a policy matter whether Virginia's media-access provision should be broadened to encompass other media. But because that issue was "barely discussed" by the parties and "not examined" by the Court of Appeals, it "is not properly pursued in this Court."<sup>25</sup> It suffices to say that Virginia has genuinely attempted to give the press access to its non-judicial records to further help the citizenry see what its government is up to.

Accordingly, the records at issue in the case are non-judicial, governmental records that do not relate to the person making the request. McBurney seeks documents from the Division of Child Support Enforcement (DCSE) of the Virginia Department of Social Services that do not pertain to him but that might help him understand the DCSE's delay in handling an application it filed to obtain child support from his ex-wife. (4th Cir. J.A. 37A-38A.) And Hurlbert seeks certain property assessment records from the tax assessor for Henrico County, Virginia (*id.* at 47A), not land records or tax liens that could have been obtained from the Clerk of the Circuit Court of Henrico County.

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<sup>24</sup> VA. CODE ANN. § 2.2-3704(A).

<sup>25</sup> *Ark. Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 522 & n.1 (2012).

**II. Because open-records laws substantially burden State and local governments, the Court should exercise caution before holding that the Constitution requires that States give non-citizens the same access rights as citizens.**

While amici generally support open-records laws, they have first-hand experience that providing open access results in significant unreimbursed staff time and distracts public employees from their primary mission. And while State laws typically authorize public bodies to obtain partial reimbursement, they do not fully compensate for the actual expense and burden. This is true in Virginia and elsewhere.

Petitioners are simply incorrect that “Virginia law authorizes the state to *fully* recoup its actual cost incurred through fees.” (Pet’rs’ Br. 19 (emphasis added).) It is true that Virginia’s FOIA states that a public body “may make reasonable charges *not to exceed its actual cost* incurred in accessing, duplicating, supplying, or searching for the requested records.”<sup>26</sup> But that does not mean that public bodies are permitted to recover, let alone that they routinely recover, their “actual cost.”

The statute cautions that “[n]o public body shall impose any extraneous, intermediary or surplus fees or expenses to recoup the general costs associated with creating or maintaining records or transacting the general business of the public body.”<sup>27</sup> In those frequent instances in which significant staff or attorney time is required to review and produce records,

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<sup>26</sup> VA. CODE ANN. § 2.2-3704(F) (2011) (emphasis added).

<sup>27</sup> *Id.*

this limitation prevents public bodies from recovering their true costs. Records must often be reviewed by legal counsel to screen them for information protected by the attorney-client privilege or work-product doctrine.<sup>28</sup> Virginia legal guidance currently instructs that a public body may *not* charge its *attorney's* hourly rate for reviewing documents for privilege, except perhaps in rare or extraordinary circumstances.<sup>29</sup> In addition, a public body cannot recover any portion of the overhead and employee-benefit costs associated with the time spent by public employees searching and reviewing records, even if the employees spend many hours on those tasks.<sup>30</sup> Nor can a public body charge separately for the time spent redacting a document and the time determining its responsiveness; the redactions must be made simultaneously with the initial review.<sup>31</sup>

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<sup>28</sup> See VA. CODE. ANN. §§ 2.2-3705.1(1)-(2) (2011) (exempting from mandatory production "records protected by the attorney-client privilege" and legal "work product").

<sup>29</sup> Letter from Maria J.K. Everett, Executive Director, Va. Freedom of Info. Advisory Council, to Sylvia Saunders, Southeastern Public Service Authority (Mar. 14, 2007), *available at* [http://foiacouncil.dls.virginia.gov/ops/07/AO\\_02\\_07.htm](http://foiacouncil.dls.virginia.gov/ops/07/AO_02_07.htm). Other States similarly limit recoverable costs to respond to open-records requests. For instance, Alabama and New Jersey impose the same limitations as Virginia on the recovery of counsel fees incurred to protect privileged information from disclosure. See 251 Ala. Op. Atty. Gen. 38 (June 12, 1998); *Courier Post v. Lenape Reg'l High Sch. Dist.*, 821 A.2d 1190, 1200-01 (N.J. Super. Ct. Law Div. 2002).

<sup>30</sup> Letter from Maria J.K. Everett, Executive Director, Va. Freedom of Info. Advisory Council, to Scott Madsen (May 24, 2002), *available at* [http://foiacouncil.dls.virginia.gov/ops/02/AO\\_05.htm](http://foiacouncil.dls.virginia.gov/ops/02/AO_05.htm).

<sup>31</sup> *Id.*



These various limitations result in significant, unreimbursed costs, particularly when FOIA requests are used by adverse parties as an alternative to litigation discovery. For instance, the Fairfax County Water Authority, a political subdivision of Virginia, recently responded to a FOIA request received before the requestor commenced litigation. Because it was unable to charge for the cost incurred by its legal counsel to screen the records for privileged information, and because it could not recover the cost of creating the electronic review database that was needed to facilitate the collection and review of records, the public body was able to recover only \$16,510 in reimbursable costs from the requestor; the actual cost exceeded \$200,000.<sup>32</sup>

Virginia's statute also does not ensure that the public body is compensated even for allowable charges. A public body in Virginia may require an advance deposit only if the estimated cost exceeds \$200.<sup>33</sup> If the requestor fails to collect the materials or to pay the bill, no mechanism exists to compel reimbursement, although the public body may refuse further requests for a requestor who is in arrears.<sup>34</sup>

Examples of such uncompensated FOIA burdens abound throughout the country. For instance:

- Catawba County, North Carolina, received a FOIA request from a graduate student work-

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<sup>32</sup> Letter from Jeanne Bailey, Public Affairs Officer, Fairfax County Water Authority, to Stuart Raphael, Esq. (Jan. 25, 2013) (Rule 32.3 lodging request pending).

<sup>33</sup> VA. CODE ANN. § 2.2-3704(H) (2011); *Hill v. Fairfax Cnty. Sch. Bd.*, 83 Va. Cir. 172, 178 n.4 (2011), *aff'd on other grounds*, 727 S.E.2d 75 (Va. 2012).

<sup>34</sup> VA. CODE ANN. § 2.2-3704(I).

ing with a professor at an out-of-state university seeking all emails for every department head for the month of February 2011. The request covered 17 separate departments and required the department heads to spend an average of 20 hours each to compile a total of 25,743 emails, corresponding to approximately \$20,000 in unreimbursed staff-time. The out-of-state requestor subsequently abandoned the request and never sought to collect the records.<sup>35</sup>

- In Minnesota, a citizen requested “all public data on all past and present employees” of five State agencies, a dragnet covering 11,000 individuals.<sup>36</sup> In several prior instances, she failed to review the records after they were compiled.<sup>37</sup> While the Minnesota Commissioner of Administration determined that “unique” circumstances warranted denying this particular request, he emphasized it was in “no way intended to suggest that a government entity does not have to respond to a data request merely because responding will be costly or time-consuming.”<sup>38</sup> The same person subsequently made a similar request to a local school district, which would have required two employees working full-time for

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<sup>35</sup> Letter from Debra Bechtel, County Attorney for Catawba County, N.C., to Stuart Raphael, Esq. (Jan. 15, 2013) (Rule 32.3 lodging request pending).

<sup>36</sup> Minn. Dep’t of Admin. Op. 01-031 (Mar. 22, 2001), *available at* <http://www.ipad.state.mn.us/opinions/2001/01031.html>.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

more than a year to answer at a cost of at least \$100,000.<sup>39</sup> The Commissioner again opined that the request could be denied based on the extreme burden and unique circumstances there, but he reiterated that cost and burden alone ordinarily are not enough to refuse a public records request.<sup>40</sup>

- In the State of Washington, the City of Gold Bar received 82 public record requests from a group of allied requestors. "To avoid the city from coming to a standstill, the city hired an additional employee and transferred an employee from the maintenance department to work on responding to [the] requests."<sup>41</sup> Although the court held that the city's delay and actions in responding were reasonable, the "city spent 12 percent of its income responding to public records requests in 2010."<sup>42</sup>
- In Utah, the media recently described an epic FOIA battle that "began in 2002, took seven years to play out, produced more than 250,000 documents and involved tens of thousands of dollars."<sup>43</sup>

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<sup>39</sup> Minn. Dep't of Admin. Op. 01-034 (Mar. 27, 2001), available at <http://www.ipad.state.mn.us/opinions/2001/01034.html>.

<sup>40</sup> *Id.*

<sup>41</sup> *Forbes v. City of Gold Bar*, No. 66630-4-I, 2012 Wash. App. LEXIS 2637, at \*6 (Nov. 13, 2012).

<sup>42</sup> *Id.* at \*9.

<sup>43</sup> Brooke Adams, *Battle over Alta Records Ignited HB477 War*, SALT LAKE TRIBUNE (Apr. 25, 2011), available at <http://www.sltrib.com/sltrib/news/51664304-78/town-records-tolton-documents.html.csp>.

- In Maine, “[s]ome towns have seen 80 to 100 [public record] requests from the same individual or small group of people over a one-year period.”<sup>44</sup> The Maine Municipal Association reports that “[i]t’s very disruptive to small towns . . . . The requests are repetitive, often redundant, and they take many, many hours to sort out.”<sup>45</sup>

Using open-records laws for litigation leverage is also commonplace. The Village of Bull Valley, Illinois, a small rural community of 500 residents, was served with multiple records requests by a real estate developer whose attorney admitted that his approach was to “carpet bomb” the Village to pressure it to give up on the litigation because of the expense.<sup>46</sup> And as noted by the City Attorney for Portland, Maine, “[s]ome law firms use [the public records law] to try to get us to settle with them. It’s an unfortunate perversion of the law.”<sup>47</sup>

In short, open-records requests can be costly to comply with and can divert State and local officials from their primary mission. Accordingly, the Court should exercise great caution before adopting any constitutional rule that is premised on the false assumption that State FOIA laws fully reimburse the

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<sup>44</sup> Judith Meyer, *Peru Man’s Requests Anger Town Officials*, SUN JOURNAL (Aug. 14, 2011), available at <http://www.sunjournal.com/river-valley/story/1073236>.

<sup>45</sup> *Id.*

<sup>46</sup> Letter from Michael J. Smoron, Esq., to Brian Day, Illinois Municipal League (Mar. 31, 2011) (Rule 32.3 lodging request pending).

<sup>47</sup> Erie Conrad, *Serial FOAA Requests Swamp Officials, Staffs*, MAINE TOWNSMAN (Oct. 2011), available at <http://www.memun.org/public/publications/townsmen/2011/serial.html>.

government for the actual costs to respond to such requests. They don't.

**III. Virginia enacted its open-records laws to make Virginia's government politically accountable to its own citizens, a valid exercise of the State's power to define its own political community.**

The Court has "uniformly recognized that a government unit may legitimately restrict the right to participate in its political processes to those who reside within its borders."<sup>48</sup> "[A]lthough citizenship is not a relevant ground for the distribution of economic benefits, it is a relevant ground for determining membership in the political community."<sup>49</sup> Indeed, "a State's interest in establishing its own form of government, and in limiting participation in that government to those who are within 'the basic conception of a political community.'"<sup>50</sup>

Virginia's FOIA fits comfortably within that tradition. It permits Virginia citizens to observe how their *own* government operates and to hold their *own* political officials accountable. Virginia states that purpose expressly, reciting that its FOIA "ensures the people of the Commonwealth ready access to public records in the custody of a public body or its officers and employees" so as to "afford every opportunity to citizens to witness the operations of government."<sup>51</sup>

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<sup>48</sup> *Holt Civic Club v. Tuscaloosa*, 439 U.S. 60, 68-69 (1978).

<sup>49</sup> *Cabell v. Chavez-Salido*, 454 U.S. 432, 438 (1982).

<sup>50</sup> *Id.* at 438-39 (quoting *Sugarman v. Dougall*, 413 U.S. 634, 642 (1973)).

<sup>51</sup> VA. CODE ANN. § 2.2-3700(B).



Virginia's stated purpose is similar to the policy animating the federal Freedom of Information Act. "This basic policy . . . focuses on the *citizens'* right to be informed about 'what *their* government is up to.'"<sup>52</sup> "Their" government means their *own* government, not someone else's. The relevant audience for State government consists of State citizens, just like U.S. citizens comprise the audience of citizens entitled to hold their federal officials accountable.

What is more, since Petitioners concede that a State government is not required to open its public records to anyone (Pet'rs' Br. 46), the Court should avoid a constitutional rule that requires openness to everyone as the condition of openness to the State's own citizens. As Justice Ginsburg pointed out in *Los Angeles Police Department v. United Reporting Publishing Corp.*, where the Court rejected an overbreadth challenge to a California statute that restricted the disclosure of arrestee information to limited-purpose requestors, requiring an all-or-nothing approach to records disclosure would federalize an area traditionally left to the States and could lead to *less* governmental transparency, not more:

[I]f States were required to choose between keeping proprietary information to themselves and making it available without limits, States might well choose the former option. In that event, disallowing selective disclosure would lead not to more speech overall but to more secrecy and less speech . . . . [S]ociety's interest in the

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<sup>52</sup> *United States Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 773 (1989) (quoting *EPA v. Mink*, 410 U.S. 73, 105 (1973) (Douglas, J., dissenting) (quoting NEW YORK REVIEW OF BOOKS, Oct. 5, 1972, p. 7)) (emphasis altered).

free flow of information might argue for upholding laws like the one at issue in this case rather than imposing an all-or-nothing regime under which “nothing” could be a State’s easiest response.<sup>53</sup>

**IV. Accessing non-judicial governmental records is not a “fundamental” right within the meaning of the Privileges and Immunities Clause.**

This Court has repeatedly looked to *Corfield v. Coryell*<sup>54</sup> to determine when a right is protected by the Privileges and Immunities Clause of Article IV, § 2.<sup>55</sup> Sitting as a circuit judge, Justice Washington wrote that the Clause protects rights “which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several States which compose this Union, from the time of their becoming free, independent, and sovereign.”<sup>56</sup> “When describing those ‘fundamental’ rights, Justice Washington thought it ‘would perhaps be more tedious than difficult to enumerate’ them all, but suggested that they could ‘be all comprehended under’ a broad list of ‘general heads,’ such as ‘[p]rotection by the government,’ ‘the enjoyment of

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<sup>53</sup> 528 U.S. 32, 43-44 (1999) (Ginsburg, J., concurring).

<sup>54</sup> 6 F. Cas. 546 (Cir. Ct. E.D. Pa. 1823).

<sup>55</sup> E.g., *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3067 (2010) (Thomas, J., concurring in part); *Baldwin v. Fish & Game Comm’n of Mont.*, 436 U.S. 371, 384-86 (1978); *Austin v. New Hampshire*, 420 U.S. 656, 661 (1975); *United States v. Wheeler*, 254 U.S. 281, 297 (1920); *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 75-76 (1873).

<sup>56</sup> 6 F. Cas. at 546.

life and liberty, with the right to acquire and possess property of every kind,' 'the benefit of the writ of habeas corpus,' and the right of access to 'the courts of the state,' among others."<sup>57</sup>

Obtaining access to non-judicial governmental records does not qualify as a "fundamental right" under that standard. The broad right of access to public records, advocated by Petitioners, has never been recognized as a "fundamental right," either under the Constitution or at common law.

#### **A. There is no constitutional right of access.**

In *Nixon v. Warner Communications, Inc.*,<sup>58</sup> a case involving judicial records, this Court held there was no constitutional right for the press or public to have access to the White House tape recordings introduced into evidence at the criminal trial of the Watergate conspirators.<sup>59</sup> Similarly, in *Houchins v. KQED, Inc.*,<sup>60</sup> in which this Court held that members of the press had no right of access to inspect prison facilities or interview prisoners, the plurality noted that "[t]his Court has never intimated a First Amendment guarantee of a right of access to all sources of information within government control."<sup>61</sup> "The right to speak and publish does not carry with it the unrestrained

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<sup>57</sup> *McDonald*, 130 S. Ct. at 3067 (Thomas, J., concurring) (quoting *Corfield*, 6 F. Cas. at 551-52).

<sup>58</sup> 435 U.S. 589 (1978).

<sup>59</sup> *Id.* at 608-10.

<sup>60</sup> 438 U.S. 1 (1978).

<sup>61</sup> *Id.* at 9 (Burger, C.J.).

right to gather information.”<sup>62</sup> “Neither the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government’s control.”<sup>63</sup> Indeed, “[t]here is no constitutional right to have access to particular government information, or to require openness from the bureaucracy.”<sup>64</sup> Likewise, in *United Reporting*, the Court, citing *Houchins*, said that “what we have before us is nothing more than a governmental denial of access to information in its possession. California could decide not to give out arrestee information at all without violating the First Amendment.”<sup>65</sup>

The Court recently repeated that principle in *Sorrell v. IMS Health Inc.*<sup>66</sup> *Sorrell* invalidated limitations that Vermont imposed on the ability of private pharmacies to disclose prescriber information for commercial uses. Significantly, the Court distinguished a “restriction on access to government-held information,” like the one upheld in *United Reporting*, from a “restriction on access to information in private hands,” which *Sorrell* struck down.<sup>67</sup> The dissent would have upheld the Vermont

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<sup>62</sup> *Id.* at 12 (quoting *Zemel v. Rusk*, 381 U. S. 1, 17 (1965)) (emphasis altered).

<sup>63</sup> *Id.* at 15; see also *id.* at 16 (Stewart, J., concurring) (“The First and Fourteenth Amendments do not guarantee the public a right of access to information generated or controlled by government . . .”).

<sup>64</sup> *Id.* at 14.

<sup>65</sup> 528 U.S. at 40. See also *id.* at 43 (Ginsburg, J., concurring) (“California could, as the Court notes, constitutionally decide not to give out arrestee address information at all.”).

<sup>66</sup> 131 S. Ct. 2653 (2011).

<sup>67</sup> *Id.* at 2665.

law but agreed with the majority that “this Court has *never* found that the First Amendment prohibits the government from restricting the use of information gathered pursuant to a regulatory mandate. . . .”<sup>68</sup>

That there is no Constitutional right of access to public records goes a long way to showing that it is not a “fundamental right” under the Privileges and Immunities Clause, and certainly not a fundamental right within the meaning of *Corfield*.

Cases like *Nixon*, *Houchins*, and *United Reporting* also show the error of Third Circuit’s decision in *Lee v. Minner*, which invalidated Delaware’s citizen-only provision after concluding that access to public records was a fundamental right because it was “essential” to effective “political advocacy.”<sup>69</sup> One can ignore, for the moment, that neither McBurney nor Hurlbert sought records in order to foster political advocacy.<sup>70</sup> Even assuming they had, if a right to access public records is not fundamental under the First and Fourteenth Amendments, it is hard to see how it could be fundamental under the Privileges and Immunities Clause. *Lee* overlooked that flaw in its “recognition of this new right.”<sup>71</sup> The Fourth Circuit, by contrast, correctly found that “the specific right that *Lee* identified is not one previously recognized by the Supreme Court” in its Privileges and Immunities Clause case law.<sup>72</sup>

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<sup>68</sup> *Id.* at 2677 (Breyer, J., dissenting) (emphasis altered).

<sup>69</sup> 458 F.3d 194, 200 (3d Cir. 2006).

<sup>70</sup> *McBurney v. Young*, 667 F.3d 454, 466-67 (4th Cir. 2012).

<sup>71</sup> *Jones*, 852 F. Supp. 2d at 1011.

<sup>72</sup> *McBurney*, 667 F.3d at 465.



**B. The common law recognized no fundamental right of access.**

Petitioners argue that access to public records is a fundamental right because the common law recognized a broad right of access. But Petitioners and their *amici* overstate the clarity of the common law and elide important distinctions between judicial records and non-judicial records. As noted by Harold L. Cross in his 1953 survey, cited by Petitioners (Pet'rs' Br. 5), "English courts were not often called on to enforce rights of individuals to inspect public records."<sup>73</sup> "[T]he courts declared the primary rule that there was *no general common law* right in all persons (as citizens, taxpayers, electors or merely as persons) to inspect public records or documents."<sup>74</sup>

Indeed, the early English decisions by the King's Bench, cited by Petitioners, do not support the broad right they claim. It is true that "English common law as early as 1372 authenticates a right to inspect and copy *judicial* records. All persons enjoyed the right although only persons with evidentiary or proprietary interests in the court records could enforce their right if it were wrongfully denied."<sup>75</sup> Thus, the 1745 decision in *Wilson v. Rogers*, cited by Petitioners, upheld the right of a party to inspect the records of the Court of Conscience in a proceeding in which he had been taken into custody.<sup>76</sup> The King's Bench ruled that "every man has a right to look into the

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<sup>73</sup> Harold L. Cross, *The People's Right to Know* 25 (1953).

<sup>74</sup> *Id.* (emphasis added).

<sup>75</sup> Key, *supra* note 15, at 666 (emphasis added).

<sup>76</sup> *Wilson v. Rogers*, 2 Str. 1242, 93 Eng. Rep. 1157 (K.B. 1745).

proceedings to which he is a party.”<sup>77</sup> While that decision supports the existence of “a common-law right of access to *judicial* records,”<sup>78</sup> it does not support a right of access to the *non-judicial* records at issue in this case.

To be sure, some early cases granted persons the right to inspect non-judicial records if they had a specific, proprietary interest, such as granting shareholders with a particular interest the right to inspect the books of the corporation,<sup>79</sup> or granting a tenant the right to inspect manorial records in support of his claim of tenancy.<sup>80</sup> But they denied access in the absence of such an interest. Thus, in 1789, the King’s Bench observed that “one man has no right to look into another’s title, deeds and records, when he . . . has no interest in the deeds or rolls himself . . . .”<sup>81</sup> And in 1831, it rejected a broad right of shareholders to inspect a corporation’s books and records.<sup>82</sup>

Significantly, in *Rex v. Justices of Staffordshire*, the King’s Bench ruled that taxpayers had no general

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<sup>77</sup> *Id.* at 1242, 93 Eng. Rep. at 1158.

<sup>78</sup> *Nixon*, 435 U.S. at 597 (emphasis added); but see *Rex v. Allgood*, 7 T. R. 742, 101 Eng. Rep. 1232 (K.B. 1798) (refusing mandamus to compel inspection of court rolls by tenant in absence of proceeding instituted relating to his tenancy).

<sup>79</sup> *Rex v. Fraternity of Hostmen in Newcastle-Upon-Tyne*, 2 Str. 1223, 93 Eng. Rep. 144 (K.B. 1744).

<sup>80</sup> *Rex v. Shelley*, 3 T.R. 141, 142, 100 Eng. Rep. 498, 499 (K.B. 1789); *Rex v. Lucas*, 10 East 235, 236, 103 Eng. Rep. 765, 765 (K.B. 1808) (stating that inspection request by claimant was “not the impertinent intrusion of a stranger”).

<sup>81</sup> *Rex v. Shelley*, 3 T. R. at 142, 100 Eng. Rep. at 499.

<sup>82</sup> *Rex v. Merchant Tailors’ Co.*, 2 B. & Ad. 115, 109 Eng. Rep. 1086 (K.B. 1831).

right to inspect records relating to property assessments taken by their public officials,<sup>83</sup> the same type of records sought by Petitioner Hurlbert. The Court explained:

The utmost . . . that can be said on the ground of interest, is that the applicants have a rational curiosity to gratify by this inspection, or that they may thereby ascertain facts useful to them in advancing some ulterior measures in contemplation as to regulating county expenditure; but this is merely an interest in obtaining information on the general subject, and would furnish an equally good reason for permitting inspection of the records of any other county; there is not that direct and tangible interest, which is necessary to bring them within the rule on which the Court acts in granting inspection of public documents.<sup>84</sup>

The court further cautioned that recognizing a broad right of access would impose undue burden ("no slight inconvenience") on public officials.<sup>85</sup>

In the nineteenth and early twentieth centuries, State courts in this country reached varying outcomes when confronted with whether to recognize a right of access to public records. As in England, American courts generally permitted access to judicial records in a case in which the party had an

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<sup>83</sup> 6 Ad. & E. 84, 112 Eng. Rep. 33 (K.B. 1837).

<sup>84</sup> *Id.* at 101, 112 Eng. Rep. at 39.

<sup>85</sup> *Id.* at 103, 112 Eng. Rep. at 39-40. This decision overruled an earlier opinion, *Rex v. Justices of Leicester*, 4 B. & C. 891, 107 Eng. Rep. 1290 (K.B. 1825), which had intimated broader taxpayer rights. See 6 A. & E. at 101-02, 112 Eng. Rep. at 39.

interest.<sup>86</sup> As to non-judicial records, however, some courts granted access<sup>87</sup> while others did not.<sup>88</sup>

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<sup>86</sup> *E.g.*, *Daly v. Dimock*, 12 A. 405 (Conn. 1887) (holding that criminal defendant in murder case could obtain witness statements compiled by the coroner and filed with the trial court); *but see In re Caswell*, 29 A. 259 (R.I. 1893) (denying non-party access to divorce records, stating "no one has a right to examine or obtain copies of public records from mere curiosity, or for the purpose of creating public scandal").

<sup>87</sup> *New Jersey ex rel. Ferry v. Williams*, 41 N.J.L. 332, 334 (N.J. 1879) (granting mandamus to citizen seeking access to license rolls to confirm that purveyors of ale complied with license requirements); *Clay v. Ballard*, 13 S.E. 262, 264 (Va. 1891) (granting mandamus to permit inspection and copying of voter registration books, stating "that a party has a right to inspect and take copies of all such books and records as are of a public nature wherein he has an interest.") (emphasis omitted).

<sup>88</sup> *E.g.*, *Brewer v. Watson*, 71 Ala. 299, 305 (1882) (denying access to inspect state-auditor records to attorney who failed to prove he was representing person with an interest; "[t]he individual demanding access to, and inspection of public writings must not only have an interest in the matters to which they relate, a direct, tangible interest, but the inspection must be sought for some specific and legitimate purpose. The gratification of mere curiosity, or motives merely speculative will not entitle him to demand an examination of such writings."); *Cormack v. Wolcott*, 15 P. 245, 246 (Kan. 1887) (denying mandamus to plaintiff seeking to compile abstracts of title records; "[a]t common law, parties had no vested rights in the examination of a record of title, or other public records, save by some interest in the land, or subject of record."); *Belt v. Prince George's County Abstract Co.*, 20 A. 982, 983 (Md. 1890) (holding that title record company had no common law or statutory right to examine title records); *Diamond Match Co. v. Powers*, 16 N.W. 314, 315-16 (Mich. 1883) (holding that foreign corporation had no right to inspect registry of deeds); *Minnesota v. McCubrey*, 87 N.W. 1126, 1127 (Minn. 1901) (holding that abstract company had no common law or statutory right to inspect title records).

Petitioners and their *amici* incorrectly suggest that the results in America were uniform. Cross's 1953 survey more accurately reflects the varying results.<sup>89</sup>

That mixed track record—in England and this country—is inadequate to show that the right of access to non-judicial public records is “fundamental” under *Corfield*. To the contrary, it is demonstrably *not* a right that has “at *all* times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign.”<sup>90</sup> Indeed, had the common law recognized a broad right of access to public records, there would have been no need for States to enact public record laws in the first place, and McBurney and Hurlbert could have brought common law claims for the records they seek here.

**C. *Nixon v. Warner Communications, Inc.*  
did not establish a common-law right  
of access to non-judicial records.**

Petitioners misread this Court's dictum in *Nixon v. Warner Communications, Inc.*<sup>91</sup> when they claim that *Nixon* recognized a common law, “general right to inspect and copy public records and documents.” (Pet'rs' Br. 45.) As noted above, the issue in *Nixon* was whether the district court should have released to the press copies of White House tape recordings that had been introduced into evidence and played at the criminal trial of the Watergate conspirators. The parties “acknowledge[d] the existence of a common-law right of access to *judicial* records, but they dif-

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<sup>89</sup> Cross, *supra* note 73, at 55-56.

<sup>90</sup> 6 F. Cas. at 551 (emphasis added).

<sup>91</sup> 435 U.S. 589 (1978).



fer[ed] sharply over its scope and the circumstances warranting restrictions of it.”<sup>92</sup> The Court found it “difficult to distill from the relatively few judicial decisions a comprehensive definition of what is referred to as the common-law right of access or to identify all the factors to be weighed in determining whether access is appropriate.”<sup>93</sup> But the Court said it “need not undertake to delineate precisely the contours of the common-law right, as we assume, *arguendo*, that it applies to the tapes at issue here.”<sup>94</sup> The Court went on to hold that the trial court properly withheld release of the tapes because Congress prescribed in the Presidential Recordings Act a procedure for reviewing the tapes and making them available to the public.<sup>95</sup>

Unfortunately, one sentence in *Nixon* has lent itself to the misreading that the case recognized a right of access extending beyond judicial records. The Court said that “[it] is clear that the courts of this country recognize a general right to inspect and copy public records and documents, *including* judicial records and documents.”<sup>96</sup> Petitioners read that sentence as recognizing a common law right of access to all public records. (Pet’rs’ Br. 8, 45.) But that interpretation is untenable. The question on which the Court granted *certiorari* related to the “common-law right of access to *judicial* records,”<sup>97</sup> and the majority referenced such “judicial records” no fewer

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<sup>92</sup> *Id.* at 597 (emphasis added).

<sup>93</sup> *Id.* at 598-99.

<sup>94</sup> *Id.* at 599.

<sup>95</sup> *Id.* at 603-04.

<sup>96</sup> *Id.* at 597 (emphasis added).

<sup>97</sup> *Id.* at 596 (emphasis added).

than eight times.<sup>98</sup> Indeed, because the Court decided the case “on the basis of the Presidential Recordings Act, the discussion of the common law right to inspect and copy judicial records [was] mere dicta.”<sup>99</sup> It is “generally undesirable, where holdings of the Court are not at issue, to dissect the sentences of the United States Reports as though they were the United States Code.”<sup>100</sup> In truth, *Nixon* does not establish the scope of the common law right to access judicial records, let alone non-judicial records.

Petitioners are not alone, however, in reading too much into that sentence. In *Washington Legal Foundation v. United States Sentencing Commission*, the Court of Appeals for the District of Columbia read the same sentence to suggest a federal common law right of access extending beyond judicial records.<sup>101</sup> Even so, the court limited that right, ruling that it did not reach records that “are preliminary, advisory, or, for one reason or another, do not eventuate in any official action or decision being taken.”<sup>102</sup> Applying that test, the court denied the petitioners’ request for internal documents and memoranda held by the United States Sentencing Commission.<sup>103</sup> Although the Department of Justice subsequently argued “that the common law right of access is limited to *judicial* records,”<sup>104</sup> the Court of Appeals declined to revisit its

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<sup>98</sup> *Id.* at 596, 597, 598, 602, 607, 608, 611 n.20.

<sup>99</sup> Key, *supra* note 15, at 670.

<sup>100</sup> *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993).

<sup>101</sup> 89 F.3d 897, 903 (D.C. Cir. 1996) (Ginsburg, J.).

<sup>102</sup> *Id.* at 905.

<sup>103</sup> *Id.* at 906.

<sup>104</sup> *Ctr. for Nat'l Sec. Studies v. United States Dep't of Justice*, 331 F.3d 918, 936-37 (D.C. Cir. 2003) (emphasis added).

earlier ruling.<sup>106</sup> The D.C. Circuit appears to be the only circuit court to have read *Nixon* as recognizing a common law right of access that extends beyond judicial records.

**V. Virginia's FOIA does not violate the dormant Commerce Clause.**

Petitioner Hurlbert—but not McBurney—also claims that Virginia's citizens-only provision violates the “negative” or “dormant” Commerce Clause because it has prevented him from obtaining access to governmental records that he could sell to a client for profit. (4th Cir. J.A. 11-12; Pet'rs' Br. 14.) Petitioner has incorrectly framed the Commerce Clause question by assuming that Virginia enacted its open-records laws to benefit private commercial interests, rather than for the traditional governmental purpose of fostering good government and holding public officials accountable.

**A. The *per se* rule of invalidity does not apply because Virginia's FOIA serves traditional governmental purposes in promoting good government and does not facially discriminate against interstate commerce.**

There are two independent reasons why Virginia's citizens-only provision does not trigger the first-tier, “virtually *per se*” rule of invalidity urged by Hurlbert. (Pet'rs' Br. 24.)

First, as this Court said in *Department of Revenue v. Davis*, when a State engages in “a traditional governmental function,” its action “is not susceptible to *standard* dormant Commerce Clause scrutiny

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<sup>106</sup> *Id.*

owing to its likely motivation by legitimate objectives distinct from the simple economic protectionism the Clause abhors.”<sup>106</sup> “Restraint in this area is . . . counseled by considerations of state sovereignty, the role of each State as guardian and trustee for its people . . . .”<sup>107</sup> In this case, Virginia was acting “for the benefit of a government fulfilling governmental obligations,” not “for the benefit of private interests, favored because they were local.”<sup>108</sup>

Providing access to the government’s own records is unquestionably a traditional governmental function. Virginia makes clear that it undertook that function to improve governance and accountability, not to promote its citizens’ private interests. Virginia’s FOIA appears in Title 2.2 of the Virginia Code, in Subtitle II (“Administration of State Government”) as the very first chapter of Part B—“Transaction of Public Business.” It recites that “[t]he affairs of government are not intended to be conducted in an atmosphere of secrecy since at all times the public is to be the beneficiary of any action taken at any level of government.”<sup>109</sup> Allowing Virginia citizens to access their government’s records fulfills Virginia’s interest in governmental transparency and political accountability. As the Court aptly said in *Reeves, Inc. v. Stake*, such a provision is “protectionist”

only in the sense that it limits benefits generated by a state program to those who fund the state

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<sup>106</sup> 553 U.S. 328, 341 (2008) (emphasis added).

<sup>107</sup> *Reeves, Inc. v. Stake*, 447 U.S. 429, 438 (1980) (internal quotations omitted).

<sup>108</sup> *Davis*, 553 U.S. at 341 n.9.

<sup>109</sup> VA. CODE ANN. § 2.2-3700(B).

treasury and whom the State was created to serve. Petitioner's argument apparently also would characterize as "protectionist" rules restricting to state residents the enjoyment of state educational institutions, energy generated by a state-run plant, police and fire protection, and agricultural improvement and business development programs. Such policies, while perhaps "protectionist" in a loose sense, reflect the essential and patently unobjectionable purpose of state government—to serve the citizens of the State.<sup>110</sup>

Second, although Virginia's FOIA distinguishes between citizens and non-citizens, it discriminates neither against similarly situated persons nor on the basis of interstate commerce. As the Court held in *General Motors Corp. v. Tracy*, "any notion of discrimination assumes a comparison of substantially similar entities."<sup>111</sup> But citizens who pay taxes and elect their governmental officials have a different and stronger claim to see their government's records than non-citizens without that relationship to the State. Accordingly, citizens and non-citizens "should not be considered 'similarly situated' for purposes of a claim of facial discrimination under the Commerce Clause."<sup>112</sup>

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<sup>110</sup> *Reeves*, 447 U.S. at 442.

<sup>111</sup> 519 U.S. 278, 298 (1997); see also *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 601 (1997) (Scalia, J., dissenting) ("Disparate treatment constitutes discrimination only if the objects of the disparate treatment are, for the relevant purposes, similarly situated.").

<sup>112</sup> *Tracy*, 519 U.S. at 310.



Moreover, Virginia's open-records law does not facially discriminate against *interstate commerce*. "The modern law of what has come to be called the dormant Commerce Clause is driven by concern about '*economic protectionism*—that is, regulatory measures designed to benefit in-state *economic* interests by burdening out-of-state competitors."<sup>113</sup> It is discrimination for that "forbidden purpose" that is suspect.<sup>114</sup> Virginia's FOIA does not meet that test. Nothing on the face of Virginia's FOIA suggests it had anything to do with economic considerations at all, let alone giving citizens a competitive economic advantage over non-citizens. That distinguishes this case from the ones cited by Hurlbert, where the Court invalidated the statute under the *per se* rule after finding that it explicitly imposed different economic burdens on in-state and out-of-state interests.<sup>115</sup> So the Fourth Circuit was correct when it concluded that Virginia's law "is wholly silent as to commerce or economic interests, both in and out of Virginia . . . . Any effect on commerce is incidental and unrelated to the actual language of VFOIA or its citizens-only provision."<sup>116</sup>

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<sup>113</sup> *Davis*, 553 U.S. at 337-38 (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273-274 (1988)) (emphasis added).

<sup>114</sup> *Id.* at 338.

<sup>115</sup> *Camps Newfound*, 520 U.S. at 581 (invalidating Maine law that denied a property-tax exemption to charitable institutions if they operated principally for the benefit of nonresidents); *Oregon Waste Systems, Inc. v. Dep't of Env'l Quality of Ore.*, 511 U.S. 93, 100 (1994) (invalidating Oregon statute that imposed surcharge on disposal of solid waste generated out-of-state); *Philadelphia v. New Jersey*, 437 U.S. 617, 628 (1978) (invalidating New Jersey law that prohibited disposal of most forms of solid or liquid out-of-state waste).

<sup>116</sup> *McBurney*, 667 F.3d at 469.

That conclusion is not undermined by *Reno v. Condon*,<sup>117</sup> a case involving Congress's *affirmative* powers under the Commerce Clause. The Court said that Congress could properly find that motor vehicle information sold by the States for commercial purposes could qualify as "a 'thing in interstate commerce,' and that the sale or release of that information in interstate commerce is therefore a proper subject of congressional regulation."<sup>118</sup> But even assuming for argument's sake that Congress could expand its reach under *Reno* to regulate *all* State and local governmental records, it would not carry the day for Hurlbert. For saying that public records are subject to potential regulation by Congress is different from concluding that a State facially discriminates against interstate commerce when it opens its governmental records only to its own citizens in order to promote governmental transparency and political accountability. Virginia's FOIA law survives first-tier dormant Commerce Clause scrutiny, not because public records can *never* constitute things in interstate commerce, but because the statute was enacted to serve a traditional governmental purpose and does not facially discriminate on the basis of interstate commerce.

**B. Virginia's statute is not invalid under the *Pike* balancing test.**

Under *Pike v. Bruce Church, Inc.*, a plaintiff who fails in the first tier of the analysis to show that a statute facially discriminates against interstate commerce can nevertheless succeed in invalidating it by showing that its effect interferes with interstate

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<sup>117</sup> 528 U.S. 141 (2000).

<sup>118</sup> *Id.* at 148.

commerce and that "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."<sup>119</sup> The Fourth Circuit found that Hurlbert waived any argument about how the District Court applied the *Pike* test by failing to argue it in his opening brief below.<sup>120</sup> But even absent that procedural default, *Pike* does not call for invalidating Virginia's statute.

Importantly, *Davis* left open "whether *Pike* even applies to a case of this sort."<sup>121</sup> Here, as in *Davis*, the State has engaged in "traditional government function" that was "for the benefit of a government fulfilling governmental obligations . . . ."<sup>122</sup> Even though Kentucky did not dispute *Pike*'s applicability in *Davis*,<sup>123</sup> the Court declined to apply *Pike*; the test would have required the Court to balance the complex economic costs and benefits resulting from Kentucky's decision to grant a tax-exemption for interest on State and municipal bonds only if the bonds were issued by Kentucky or its political subdivisions. The Court said "it must be apparent to anyone that . . . a cost-benefit analysis would be a very subtle exer-

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<sup>119</sup> 397 U.S. 137, 142 (1970); *Davis*, 553 U.S. at 353 ("Concluding that a state law does not amount to forbidden discrimination against interstate commerce is not the death knell of all dormant Commerce Clause challenges, for we generally leave the courtroom door open to plaintiffs invoking the rule in *Pike*, that even nondiscriminatory burdens on commerce may be struck down on a showing that those burdens clearly outweigh the benefits of a state or local practice.").

<sup>120</sup> *McBurney*, 667 F.3d at 469-70.

<sup>121</sup> 553 U.S. at 353.

<sup>122</sup> *Id.* at 341 n.9.

<sup>123</sup> *Id.* at 353.

cise.<sup>124</sup> And it was an exercise that the Court said was not suited to judicial decision-making.<sup>125</sup> In his opinion concurring in part, Justice Scalia added that such balancing was *always* inappropriate because the benefits and burdens are “always incommensurate,” like weighing “apples” against “tangerines”:

The problem is that courts are less well suited than Congress to perform this kind of balancing *in every case*. The burdens and the benefits are *always* incommensurate, and cannot be placed on the opposite balances of a scale without assigning a policy-based weight to each of them. It is a matter not of weighing apples against apples, but of deciding whether three apples are better than six tangerines.<sup>126</sup>

That admonition applies no less in this case. The *Pike*-balancing test would require the Court to weigh the good-government benefits provided to Virginia and its citizens by Virginia’s open-records law against the alleged economic burdens that a citizens-only provision imposes on the national economy, discounting that burden by the risk (identified by Justice Ginsburg in *United Reporting*<sup>127</sup>) that Virginia might choose to end her open-access policy altogether were she confronted with the all-or-nothing choice urged by Petitioners. The burdens and benefits are not comparable. As Justice Scalia correctly assessed, “you cannot decide which interest ‘outweighs’ the

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<sup>124</sup> *Id.* at 354.

<sup>125</sup> *Id.* at 355.

<sup>126</sup> *Id.* at 360 (Scalia, J., concurring in part) (emphasis added).

<sup>127</sup> 528 U.S. 32, 43-44 (1999) (Ginsburg, J., concurring).

other without deciding which interest is more important to you.”<sup>128</sup>

## CONCLUSION

Open-records laws serve important public interests by making the government more transparent and accountable to the citizenry it serves. But the burden of complying with public-record requests is significant and is only partially offset by provisions requiring reimbursement. The States have historically enjoyed great flexibility to determine the extent to which they should open their governmental records to the public, particularly their non-judicial records. The rule urged by Petitioners would require an all-or-nothing decision by States that are not constitutionally required to release such records at all. It could well lead to less openness, not more.

The decision below should be affirmed.

Respectfully submitted,

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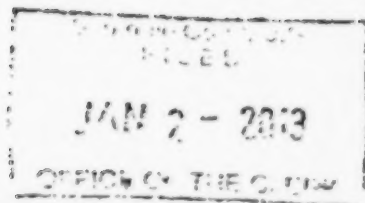
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<sup>128</sup> *Davis*, 553 U.S. at 360 (Scalia, J., concurring in part).



**AMICUS  
CURIAE  
BRIEF**

RECORD  
AND  
DEEDS



No. 12-17

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IN THE  
**Supreme Court of the United States**

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MARK J. MCBURNEY AND ROGER W. HURLBERT,

*Petitioners,*

v.

NATHANIEL YOUNG, JR., AND THOMAS C. LITTLE,

*Respondents.*

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On Writ of Certiorari to the  
United States Court of Appeals for the  
Fourth Circuit

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**BRIEF OF PUBLIC JUSTICE, P.C.,  
AS AMICUS CURIAE IN SUPPORT OF  
PETITIONERS**

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## **QUESTION PRESENTED**

Is it unconstitutional for a state to preclude citizens of other states from enjoying the same right of access to public records that the state affords its own citizens?

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## INTEREST OF AMICUS

Public Justice, P.C., is national public interest law firm dedicated to pursuing justice for the victims of corporate, governmental, and other abuses. Public Justice specializes in precedent-setting and socially significant cases designed to advance consumers' and victims' rights, civil rights and civil liberties, employees' rights, the preservation and improvement of the civil justice system, and the protection of the poor and powerless.

As part of its Project ACCESS, Public Justice regularly seeks to unseal court records to expose and provide public access to evidence of corporate and governmental wrongdoing—particularly abuses concerning serious risks to public safety. Access to public records, including judicial records, is an important tool in protecting consumer and civil rights. Because of Public Justice's extensive experience litigating access to court records, it has significant expertise in the common-law and constitutional right of access to public records.<sup>1</sup>

## SUMMARY OF ARGUMENT

Petitioners Mark McBurney and Roger Hurlbert sought access to public records under Virginia's

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<sup>1</sup> This brief is filed under Petitioners' blanket consent filed with the Court, and Respondents' written consent to the filing of this brief. No person other than *amicus* Public Justice or its counsel authored or provided financial support for this brief. Leah Nicholls, counsel of record for Public Justice, previously represented the Petitioners, Mark McBurney and Roger Hurlbert, and her name appears on the Petition. While the Petition in this case was pending, Ms. Nicholls changed firms, and she no longer represents Petitioners in this or any other matter.

Freedom of Information Act, and each was denied access to the public records he requested solely because he was not a citizen of Virginia. Pet. App. 8a. Denying access to public records on the basis of state citizenship violates the anti-discrimination principles of the Privileges and Immunities Clause of Article IV of the United States Constitution.

The Privileges and Immunities Clause prohibits states from discriminating on the basis of state citizenship if the discrimination burdens a right protected by the Clause. Rights are protected by the Clause if they are “basic to the maintenance or well-being of the Union.” *Baldwin v. Fish & Game Comm’n of Mont.*, 436 U.S. 371, 388 (1978). Rights that this Court has recognized as protected include the right to pursue a common calling, own property, access courts, equal tax treatment, travel, and receive medical treatment.<sup>2</sup>

When the Privileges and Immunities Clause was drafted, the common-law right to access public records was a well-established, basic right. The common-law right, particularly in the eighteenth century, was primarily grounded in protecting private property and legal rights. The central rights that have been recognized as protected by the Clause are based on those same interests: protecting

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<sup>2</sup> *Saenz v. Rose*, 526 U.S. 489, 501 (1999) (travel); *United Bldg. & Constr. Trades Council of Camden Cnty. & Vicinity v. Mayor & Council of Camden*, 465 U.S. 208, 219 (1984) (common calling); *Austin v. New Hampshire*, 420 U.S. 656, 662 (1975) (tax treatment); *Doe v. Bolton*, 410 U.S. 179, 200 (1973) (medical treatment); *Canadian N. Ry. Co. v. Eggen*, 252 U.S. 553, 562 (1920) (access to courts); *Blake v. McClung*, 172 U.S. 239, 254 (1898) (own property).

property and legal rights. Because access to public records was well established at the time the Constitution was drafted and because it is motivated by the same concerns as the rights this Court has recognized as protected by the Clause, access to public records is basic to the maintenance of the Union and protected by the Privileges and Immunities Clause.

### ARGUMENT

#### I. THE COMMON-LAW RIGHT OF ACCESS TO PUBLIC RECORDS WAS WELL ESTABLISHED AT THE TIME THE CONSTITUTION WAS DRAFTED AND WAS RECOGNIZED BY EARLY AMERICAN COURTS.

Freedom of information statutes are a relatively modern phenomenon, but, as detailed below, the right to access public records has existed at common law since at least the fourteenth century. Thus, the common-law right was in force at the time the Privileges and Immunities Clause was drafted. The interests served by that right, as understood by English and American courts of the eighteenth and nineteenth centuries, are the same as the interests served by other rights protected by the Clause—protecting the property and business rights that are basic to maintaining a unified a nation.

The most limited iteration of the common-law right to access public records involved a person showing that he or she had a legitimate interest in the information sought—idle curiosity was insufficient. Typically, a requester was able to establish an interest by establishing a need to use the record for pending or possible litigation or for a

property- or business-related interest. Some courts, especially American courts, also acknowledged that, if a requester could not show a litigation or business interest in the information contained in the public record, the interest a taxpayer citizen had in the proper expenditures of public money or the operation of government also was a sufficient interest. There was no indication, however, that the requester needed to be a citizen of the jurisdiction that held the public record if the requester otherwise had a legitimate interest in the record.

Because the history, structure, and rationale of the common-law right to access public documents are the same as—and overlap—the central rights this Court has explicitly recognized as protected by the Privilege and Immunities Clause, the right to access records is equally basic to the maintenance of the Union and protected by the Privileges and Immunities Clause.

### **A. English Common Law**

Although the exact scope of the English right to access public records was unsettled at the time the Constitution was drafted, it was agreed that, at a minimum, an individual with a property or litigation interest in a public record was entitled to inspect it. Some American courts have described the English rule as only permitting access to public records that the requester might use as evidence in pending or future litigation, but, often, English courts permitted access to public records in the absence of litigation. *See, e.g., Ferry v. Williams*, 41 N.J.L. 332, 334 (N.J. 1879) (describing English common law as requiring the requester to be seeking evidence for use in litigation); *Herbert v. Ashburner*, (1750) 95 Eng. Rep.



628; 1 Wils. K.B. 297 (records' relevance to litigation irrelevant).

The right to access public records in England dates to at least 1372, when, by ordinance, the English Parliament opened court records to inspection even if the records would ultimately be used against the King. 46 Edw. 3 (1372); 2 Eng. Stat. at Large 191, 196-97 (1341-1411); *see also* 1 Simon Greenleaf, *A Treatise on the Law of Evidence* § 471, at 522 (12th ed. 1866). English legal commentators of the seventeenth and eighteenth centuries disagreed as to whether and to what extent the 1372 ordinance required that the person seeking to inspect records have an interest in them. Lord Coke believed that no interest was required, but Sir Michael Foster interpreted the ordinance to restrict inspection rights to requesters seeking evidence for use in pending litigation to which they were parties. 2 E. Coke Reports pt. 3, Preface at vi-vii (1572-1617); M. Foster, *A Report of Some Proceedings on the Commission of Oyer* 229 (1762).

1. By the mid-1700s, English common law allowed access to all types of public records under varying conditions. With regard to records of public proceedings, "every subject ha[d] a right to inspect without shewing in his affidavit whether they relate directly to the point in question or not" so long as the disclosure of the information in the record did not violate public policy. *Rex v. Fraternity of Hostmen in Newcastle-upon-Tyne*, (1745) 93 Eng. Rep. 1144 (K.B.) 1144; 2 Str. 1223, 1223. In some cases, this right to inspect public records was tied to the interest a taxpayer had in the proper use of the taxes he had paid. *Rex v. Guardians of Great Faringdon*, (1829) 9 B. & C. 541. In others, it was tied to an



elected official's right to review the voter rolls. *Schuldham v. Bunniss*, (1774) 1 Cowp. 192, 197. But some courts did not require any connection; everyone had the right to inspect the records of public proceedings even if he or she could not demonstrate any particular interest in them. For example, in *Herbert v. Ashburner*, a litigant sought to review the session books of a local municipal corporation—the contemporary equivalent of city government—in the course of litigation over whether certain lands had been incorporated by the town. 95 Eng. Rep. at 628; 1 Wils. K.B. at 297. The other side objected, arguing that the session books might contain information unrelated to the issue in the litigation. *Id.* The court held that the session books were “public books which every body has a right to see”; it was irrelevant whether the requester had any particular interest in the records, litigation-related or otherwise. *Id.*

Although nothing in the *Herbert* decision tied access to public records to local citizenship, and the opinion does not indicate whether the record-seeker was a member of the municipality, other English cases tie access to the records of municipal corporations to membership in the corporation—members of the corporation were those who could vote in the corporation's political elections but were not necessarily local residents. For example, an individual looking to inspect the municipal corporation's account books during a customs dispute could not do so because he was not a member of the corporation. *Mayor of Exeter v. Coleman*, (1754) Barnes 238 (K.B.). Outside of litigation, members of the municipal corporation had at least some access to all the municipal records by virtue of their membership. See *Rex v. Babb*, (1790) 3 T.R. 579

(K.B.) 580 (“[I]t may be admitted that in certain cases the members of a corporation may be permitted to inspect all papers relating to the corporation.” (Lord Kenyon, C.J.)); see also 1 John F. Dillon, *The Law of Municipal Corporations* § 240, at 354 (2d ed. 1873) (“Every corporator has a right to inspect all the records, books, and other documents of the corporation, upon all proper occasions[.]” (emphasis in original)).

In addition to membership, a business or litigation interest was also independently sufficient to establish a right to access the records of a municipal corporation. In the context of access to records in the course of litigation, as one judge put it, “I see no difference between the application of a stranger and a corporator.” *Babb*, 3 T.R. at 581 (Ashhurst, J.). Further, non-members had access to records that concerned laws that had an impact on their business interests, despite their lack of membership in the municipal corporation. *Harrison v. Williams*, (1824) 3 B. & C. 162 (K.B.); see also *Brewers Co. v. Benson*, (1753) Barnes 236 (K.B.) (non-member of non-municipal corporation could inspect corporate records when the records affected the requester’s business).

2. If government proceedings—including some judicial proceedings—were not public, individuals could inspect the records if the records were part of litigation brought by or against the requester. Some courts held that it was sufficient for the requester to have been a party to the proceedings to access the records. *Rex v. Brangan*, (1742) 168 Eng. Rep. 116 (Old Bailey) (holding that every prisoner has a right to a copy of his felony indictment to use for whatever purpose); see also *Wilson v. Rogers*, (1745) 2 Str. 1242

(K.B.) (“[E]very man has a right to look into the proceedings to which he is a party.”); *Jackson v. Wickes*, (1816) 2 Marsh. 354 (permitting a defendant a day to inspect the court record in his case). Other courts, however, further required that the requester need the record as evidence in litigation. See, e.g., *Fraternity of Hostmen*, 93 Eng. Rep. at 1146, 2 Str. at 1223 (“[E]very person has a right to a copy of those proceedings of limited jurisdictions which are had against himself, where it is necessary in a suit instituted either by or against him.”).

3. Similarly, real property records were accessible to those with an interest in the property. In eighteenth-century England, manor records served as real property records and were equivalent to the types of public records—real property tax assessment records—that petitioner Hurlbert seeks from Henrico County here. Manor records included the rolls of copyhold courts, which kept records of all real property transactions. See *Black’s Law Dictionary* 360 (8th ed. 2004). “The tenants of a manor are the only persons who have a right to inspect the court-rolls.” *Roe v. Aylmar*, (1753) Barnes 236 (K.B.). English courts were divided, however, over whether a manor tenant had an absolute right to inspect records of that manor—which would have necessarily included the real property records of the requesting tenant—or whether the requesting tenant also had to show a particular need or interest in the records. For example, in *Rex v. Shelley*, the court held that it was “clearly settled, that where the tenant of a manor demands leave to inspect the court rolls and it is refused him, the Court will grant a mandamus to compel it.” (1789) 3 T.R. 141, 142; see also *Hobson v. Parker*, (1753) Barnes 237 (K.B.) (freeholders, as well

as tenants, have the right to inspect manor court rolls). A later court, however, rejected such a broad reading of *Shelley*, deciding that unless "there was some cause depending, the tenant had no right to call for an inspection of the court rolls." *Rex v. Allgood*, (1798) 7 T.R. 746, 746. In the later case, the court reconciled the holding in *Shelley* by noting that in *Shelley*, there had, in fact, been an underlying cause or proceeding. *Id.* There appears to be no dispute that when a property owner needed access to property records to protect his property rights, however, the owner had the right to inspect the records. See *Folkard v. Hemet*, (1776) 2 Black. W. 1061 (K.B.) 1061-62.

Access to government records to establish property interests extended beyond real property registered in the manor rolls. For example, a lessee of public market space in London was permitted to inspect government records setting out the boundaries of the market to solve a dispute over the extent of the leased area. *Warriner v. Giles*, (1733) 2 Str. 954 (K.B.) 954-55. The court reasoned that the records outlining the market boundaries were comparable to "court rolls, which are not considered as evidence of the lord, but in the nature of publick books." *Id.* at 955. Similarly, an officer's widow was permitted to inspect the books of the commissioners of the army. *Moody v. Thurston*, (1719) 1 Str. 304 (K.B.). Since the widow would have lacked full civil and political rights—and it seems farfetched that there was a general right to inspect military papers—it is likely that her purpose in inspecting the books of the commissioner was to determine her right to compensation for her husband's death.

In sum, although eighteenth century English



common law was not uniform with regard to the right to access public records, by 1788, when the Privileges and Immunities Clause was ratified, English courts had long recognized a common-law right of access to public records driven by the need for individuals to protect their property interests. Indeed, access to public records often depended most heavily on the extent to which the requester had an interest in the record; citizenship or membership, meanwhile, was sometimes sufficient but rarely necessary.

### **B. American Common Law**

Nineteenth- and early twentieth-century America continued the tradition of access to public records, with American courts leaning heavily on English common law in recognizing such a right. *See, e.g., Ferry*, 41 N.J.L. at 334-39 (describing English cases in detail); *Clay v. Ballard*, 13 S.E. 262, 264 (Va. 1891) (citing Greenleaf §§ 471 and 478 and relying on that treatise's description of English common law). Modern courts continue to recognize the rich common-law history of access to public records and acknowledge that that right predates the drafting of the Constitution. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 564-73 (1980); *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597-98 (1978); *Leucadia, Inc. v. Applied Extrusion Techs., Inc.*, 998 F.2d 157, 161 (3d Cir. 1993); *In re Reporters Comm. for Freedom of the Press*, 773 F.2d 1325, 1332-33 (D.C. Cir. 1985); *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1066-67, 1068-69 (3d Cir. 1984).

Although all early American courts recognized a common-law right to access public records, as among the English courts, the scope of the right was not



uniform. Like the English courts, American courts often required a requester to have some legitimate interest in the records sought—satisfying “idle curiosity” or creating “public scandal” were insufficient reasons. *Cormack v. Wolcott*, 15 P. 245, 247 (Kan. 1887); *City of St. Matthews v. Voice of St. Matthews, Inc.*, 519 S.W.2d 811, 815 (Ky. 1974); *In re Caswell*, 29 A. 259, 259 (R.I. 1893); see M.C. Dransfield, Annotation, *Restricting Access to Judicial Records*, 175 A.L.R. 1260, § 2 (1948). Many courts considered citizenship and taxpayer status to be sufficient, but not necessary interests; courts only reached the question if the requester did not have another business or property interest in the records. Likewise, if the requester had a business, litigation, or property interest, he or she did not have to be a citizen. See, e.g., *State v. King*, 57 N.E. 535, 537-38 (Ind. 1900); *Nowack v. Fuller*, 219 N.W. 749, 751 (Mich. 1928). American courts generally rejected what they viewed as the English requirement that the requester need the records for a litigation purpose. See *Nixon*, 435 U.S. at 597 (collecting cases).

Some jurisdictions codified access to all or some types of public records—access to judicial dockets and judgments of the federal courts, for example, was guaranteed by statute. Act Aug. 12, 1848, ch. 166, 9 Stat. 292 (listing federal court records open to inspection); Act Aug. 1, 1888, ch. 729, 25 Stat. 357 (same); *State v. Grimes*, 84 P. 1061, 1062 (Nev. 1906) (describing Nevada public records law). Other jurisdictions relied exclusively on the common-law right to access public records, but even where a statute was in place, courts generally assumed that, unless the statute provided otherwise, the legislature

intended to codify the common-law right to access public records. See, e.g., *Clay*, 13 S.E. at 264. Thus, whether or not there was a statute, early American courts—including Virginia courts—unanimously recognized a common-law right to inspect public records that flowed from English common law. See, e.g., *id.* at 263 (following common law in interpreting Virginia's access to public records statute).

1. For example, American courts were unanimous that individuals with an interest in particular real property had a common-law right to inspect government-held records about that property. See, e.g., *Cormack*, 15 P. at 246; *Webber v. Townley*, 5 N.W. 971, 972 (Mich. 1880); *Grimes*, 84 P. at 1063-73 (surveying cases); see also P.M. Dwyer, Annotation, *Right of Abstractor or Insurer of Title to Inspect or Make Copies of Public Records*, 80 A.L.R. 760, part XI (1932). The purpose of the common-law rule was to protect the investment of the potential purchaser: "Caveat emptor being the rule with us in the absence of a special agreement, it is just and essential to the protection of persons intending to purchase or take encumbrances that they be allowed the right of inspection." *Grimes*, 84 P. at 1073; see also *Cormack*, 15 P. at 246. That rule and rationale dates to the English common-law right of tenants to inspect the manor rolls, which, as explained above (at 8-9), similarly contained recorded property rights to which property-holders needed access to protect their property rights.

Though it was well established that an individual with an interest in particular property had a right to inspect property records about that property, there was some debate as to whether title abstractors who—like petitioner Hurlbert—sought to copy the

complete set of title records for commercial gain, could do so. See Dwyer, 80 A.L.R. 760, part II. The primary argument against access for title abstractors was the same one made by Respondents here: A “large expense would be incurred . . . and much time consumed” by government officials responding to such requests. *Cormack*, 15 P. at 246-47; Fourth Cir. Young Br. 41-42 (Apr. 18, 2011). Early cases parroted the English rule—that an interest in the property is required—and accepted the argument that large public records requests unduly burden officials’ time. Later cases, however, held that the increasing complexity of American land titles and the corresponding need for increased publication and dissemination of property titles justified departing from the English common-law rule and expanding the scope of access to public records to permit commercial abstractors to collect and publish general title information. See, e.g., *Shelby Cnty. v. Memphis Abstract Co.*, 203 S.W. 339, 340 (Tenn. 1918); see also Dwyer, 80 A.L.R. 760, part II (collecting cases). Since the early twentieth century, the general rule has been that title abstractors have a right to inspect real property records without a specific interest in a particular piece of property. *Id.*

2. Similarly, courts unanimously acknowledged the well-established common-law right to inspect judicial records. At the turn of the twentieth century, however, they disagreed as to whether an interest in the specific record was required. See, e.g., *Ex parte Upperco*, 239 U.S. 435, 439 (1915); *Ex parte Drawbaugh*, 2 App. D.C. 404, 406 (1894); *Caswell*, 29 A. at 259. Some of the earliest federal cases about access to judicial records involved patent records. See *Drawbaugh*, 2 App. D.C. at 404; *Sloan Filter Co. v.*

*El Paso Reduction Co.*, 117 F. 504, 507 (C.C.D. Colo. 1902) (No. 3,746). In that context, an interest in viewing a competitor's patent litigation records was a sufficient interest to justify fulfilling the request. *Id.* In other words, at least in some instances, access to court records was driven by business interests.

Courts eventually lifted any requirement that the requester have a particular interest in the court records sought. The modern justification for the common-law right to access judicial records focuses on the importance of safeguarding "integrity, quality, and respect in our judicial system" and that public access to judicial records "permits the public to keep a watchful eye on the workings of public agencies." *In re Orion Pictures Corp.*, 21 F.3d 24, 26 (2d Cir. 1994) (internal quotation marks and citations omitted); see *Richmond Newspapers*, 448 U.S. at 571-72.

3. Today, access to most government records is guaranteed by statute, and the statutory right to access records is typically more expansive than under traditional common law in that it does not require the requester to have an interest in the record requested. See *U.S. Dep't of Justice v. Julian*, 486 U.S. 1, 14 (1988) (explaining that "no one need show a particular need for information in order to qualify for disclosure under the [federal] FOIA"); *Associated Tax Serv., Inc. v. Fitzpatrick*, 372 S.E.2d 625, 629 (Va. 1988) ("[T]he purpose or motivation behind a request is irrelevant" under Virginia's Freedom of Information Act.). Nevertheless, at least at the federal level, in enacting the country's principal open records law, lawmakers saw themselves as simply codifying an important right that would have been familiar to the drafters of the



Constitution. *See, e.g.*, 112 Cong. Rec. 13,007 (1966) (statement of Rep. Benjamin Rosenthal); *id.* (statement of Rep. John Ross).

\* \* \*

When the Privileges and Immunities Clause was ratified, the common-law right to access public records was well established. Though English and American courts varied on the scope of that right, there was never a question that the right existed. And the original rationale for that right lay, not in heady notions of political participation, but simply in ensuring that individuals had the ability to protect their property and business interests. It is protecting those interests that this Court has considered to be basic to the maintenance of the Union.

## II. THE RIGHT TO ACCESS PUBLIC RECORDS IS PROTECTED BY THE PRIVILEGES AND IMMUNITIES CLAUSE.

The Privilege and Immunities Clause provides that “[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.” U.S. Const. art. IV, § 2, cl. 1. The Clause prohibits states from discriminating against citizens of other states—it “place[s] the citizens of each State upon the same footing with citizens of other States.” *Hicklin v. Orbeck*, 437 U.S. 518, 524 (1978) (quoting *Paul v. Virginia*, 75 U.S. 168, 180 (1868)). A state’s discriminatory practice is unconstitutional under the Clause if it burdens a privilege or immunity protected by the Clause. Here, no one, including Respondents, disputes that, in limiting the right to access state and local records to citizens of Virginia, Virginia’s Freedom of Information Act discriminates against out-of-staters.



The only question is whether access to public records is a right protected by the Clause. The long-standing common-law right to access public records, which was well established when the Clause was ratified, is exactly the type of privilege or immunity the Clause was designed to protect.<sup>3</sup>

A privilege or immunity is protected by the Clause if it is "basic to the maintenance or well-being of the Union." *Baldwin*, 436 U.S. at 388. Rights protected are those "which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign." *Corfield v. Coryell*, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823) (No. 3,230) (Washington, Circuit Justice).

*Corfield*, the earliest articulation of what privileges and immunities are protected by the Clause, listed as examples the rights to travel, conduct trade and other professional pursuits, access courts, own property, and be taxed equally. *Id.* at 552. In practice, the rights that have been recognized since *Corfield* are largely those described in that case. See, e.g., *Austin*, 420 U.S. at 662 (right to equal tax treatment); *Toomer v. Witsell*, 334 U.S. 385, 396 (1948) (right to practice common calling); *Canadian*

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<sup>3</sup> To be clear, *amicus* is not arguing that the Constitution guarantees access to public records. See *Houchins v. KQED, Inc.*, 438 U.S. 1, 14 (1978) (plurality opinion) (no constitutional right to government information). Rather, the Privileges and Immunities Clause requires that, if a state chooses to offer access to public records—or offer any other right protected by the Clause—it must treat state citizens and noncitizens equally in doing so.

*Northern*, 252 U.S. at 200 (right to access state courts); *Blake*, 172 U.S. at 254 (right to ownership and disposition of property); see also *Ward v. Maryland*, 79 U.S. 418, 430 (1870) (summarizing established rights as including engaging in business, acquiring personal and real property, accessing state courts, and being equally taxed). Many of the established rights—practicing a common calling, owning property, accessing courts, paying taxes—are based on the protection of business, litigation, or property interests.

Thus, the ability to protect those business, litigation, and property interests across state lines is what this Court has considered to be sufficiently basic to national unity to be protected by the Privileges and Immunities Clause. Because the right to access public records, particularly as it was understood at the time the Clause was ratified, is also driven by the need to protect business, litigation, and property interests, it, too, is basic to national unity and protected by the Clause.

1. As explained above, the core rationale for access to public records under the common law was to protect the property, litigation, and business interests of the requester—exactly the interests reflected in the rights identified in *Corfield*. At common law, tenants and property owners (or potential owners) could access title records to ascertain their property rights or to use that information to protect their rights in a dispute.

Access to property records is inextricably intertwined with the right to own property itself; without access to title records, an owner would be unable to determine the scope of his or her

ownership: "Without [property] records there would soon be that uncertainty in the title to real estate that would render it almost valueless, or involve its owners in endless litigation to protect it." *Cormack*, 15 P. at 246. Indeed, the right to own property and access public records about it is so well established that Virginia admitted below that "if a non-resident wished to run a title search to determine whether to purchase a piece of property, refusing to permit that non-resident to search the [property] records would constitute a violation of the Clause." Fourth Cir. Mims Br. 46 (Oct. 21, 2009).

As Virginia and the common-law English and American courts recognized, access to public property records is essential to—and part of—the right to property ownership, a right that indisputably protected by the Clause. *Baldwin*, 436 U.S. at 383 (property ownership protected by the Clause); *Blake*, 172 U.S. at 254 (same); *Ward*, 79 U.S. at 430 (same). In addition, the right to access property records was well established at common law at the time the Clause was drafted and has "at all times, been enjoyed by the citizens of the several states . . . , from the time of their becoming free, independent, and sovereign." *Corfield*, 6 F. Cas. at 551. Since access to property records is part and parcel of the right to ownership and was a well-established right when the Privileges and Immunities Clause was ratified, access to public real property records is basic to the well-being of the Union and protected by the Clause.

2. The Virginia Freedom of Information Act, the statute under which Petitioners requested and were denied access to public records, does not apply to court records. See Va. Code Ann. § 2.2-3704(B)(1) (Freedom of Information Act only applies to state

agencies subject to that chapter). Nevertheless, the right to access state-court records illustrates why access to other types of public records is so important.

Under English common law at the time of the Founding, individuals had access to judicial records in which they had interests, either because the requester was a party to the underlying action or because the requester needed the record to protect his or her interests, for example, to use as evidence in another action. *See supra* at 7-8. Similarly, in the United States, in the nineteenth and early twentieth centuries, some courts required that the requester have a specific interest in the court record sought. *See supra* at 13-14.

The same rationale applied to the right to appear in state courts in the United States—that an out-of-stater needed to be able to protect his or her economic rights. And the right to appear in state courts is a right indisputably protected by the Clause. *Baldwin*, 436 U.S. at 383; *Canadian Northern*, 252 U.S. at 562; *Ward*, 79 U.S. at 430. As *Canadian Northern* explained, “the constitutional requirement [in the Privileges and Immunities Clause] is satisfied if the nonresident is given access to the courts of the state upon terms which in themselves are reasonable and adequate for the enforcing of any rights he may have.” 252 U.S. at 562 (emphasis added). Because the interests protected by access to court records are the same as the interests protected by access to state courts, access to state court records, too, are basic to national unity and protected by the Privileges and Immunities Clause.

As more rights are adjudicated outside the courts,



the rationale for access to court records also applies to public records—beyond just property records—generated outside of litigation. As Justice Jackson observed sixty years ago, “[t]he rise of administrative bodies probably has been the most significant legal trend of the last century and perhaps more values today are affected by their decisions than by those of all the courts . . . . They have become a veritable fourth branch of the Government . . . .” *Fed. Trade Comm’n v. Ruberoid Co.*, 343 U.S. 470, 487 (1952) (Jackson, J., dissenting); see also *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (discussing the increasing need for Congress to delegate power to agencies); see generally Gary Lawson, *The Rise and Rise of the Administrative State*, 107 Harv. L. Rev. 1231 (1994).

Though Justice Jackson was referring to the federal administrative state, at the state level as well, an increasing number of rights are adjudicated by executive agencies acting in a “quasi-judicial” capacity. See *Minn. Ctr. for Envtl. Advocacy v. Metro. Council*, 587 N.W.2d 838, 841-42 (Minn. 1999) (discussing the definition of “quasi-judicial” for purposes of judicial review of state agency action); David E. Shipley, *The Status of Administrative Agencies Under the Georgia Constitution*, 40 Ga. L. Rev. 1109, 1113 (2006) (discussing the predominant role of state agency adjudications). To the extent state agencies are determining individuals’ rights, the same traditional common-law rationales apply to the access to agency records as they did to court records at the time of the Founding. Because state agencies increasingly possess records that individuals need to protect their interests, access to those records, too, is basic to national unity and



protected by the Privileges and Immunities Clause.

Common-law access to court records is so well established—both today and as it was at the time the Privileges and Immunities Clause was ratified—that it is hard to imagine a state being able to place restrictions on it. For example, just as Virginia cannot prohibit noncitizens from accessing public property records because access to the records is key to the right of ownership itself, Virginia could not pass a statute stating that only citizens of Virginia could access Virginia state court records for similar reasons. This is obvious, at least in part, because Virginia courts may have issued judgments or other documents that affect an out-of-stater's economic or other rights. Indeed, that is petitioner McBurney's predicament. A Virginia state agency's action resulted in McBurney losing his economic right to child support, but he was denied access to the agency's policies and procedures that led to that loss because he is not a citizen of Virginia. Today, as state agencies determine an increasing number of rights, the same rationale applies to state executive branch documents generally—not just traditional real property records—and access to them, too, should be protected by the Privileges and Immunities Clause.

3. Article IV's Full Faith and Credit Clause, which sits right next to the Privileges and Immunities Clause, lends credence to the argument that the Founders assumed that individuals had access to the public records of other states and that they saw access to those records as vital to national unity. The Full Faith and Credit Clause provides, in part, that "Full faith and credit shall be given in each state to the public acts, records, and judicial

proceedings of every other state.” U.S. Const. art. IV, § 1. The Full Faith and Credit Clause sought, among other things, to prevent individuals from evading state-court judgments by moving across state lines. Shawn Gebhardt, *Full Faith and Credit for Status Records: A Reconsideration of Gardiner*, 97 Cal. L. Rev. 1419, 1429 (2009). Before the Constitution, under the Articles of Confederation, unless a state passed a law specifically addressing the issue, state governments were powerless to enforce—or even accept as evidence—judgments that had been issued by courts elsewhere. Stephen E. Sachs, *Full Faith and Credit in the Early Congress*, 95 Va. L. Rev. 1201, 1221-26 (2009) (discussing pre-Constitution state laws). Like granting access to real property and court records generally, the purpose was to protect the property of the person in the first state, the person who had won a money judgment.

The logical predicate of the Full Faith and Credit Clause is that someone in the second state must have access to the court (and other) records of the first state. Otherwise, there would be no “records” to give full faith and credit to. Thus, the Full Faith and Credit Clause demonstrates that the drafters of the Constitution believed, first, that an individual could access government records, second, that an individual could access the government records of a state of which he or she was not a citizen, and, third, that interstate access to public records was vital to national unity. In sum, the Full Faith and Credit Clause underscores the conclusion that the Founders would understand that access to public records is a right protected by the Privileges and Immunities Clause.

# CONCLUSION

For these reasons, the judgment of the court of appeals should be reversed.

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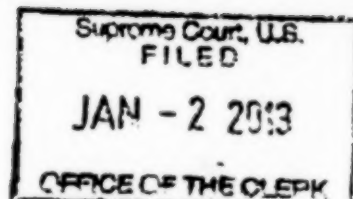
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**AMICUS  
CURIAE  
BRIEF**

RECORD  
AND  
BRIEFS

No. 12-17



IN THE  
**Supreme Court of the United States**

MARK J. MCBURNEY, AND ROGER W. HURLBERT,  
*Petitioners,*

v.

NATHANIEL L. YOUNG, DEPUTY COMMISSIONER  
AND DIRECTOR, VIRGINIA DIVISION OF CHILD  
SUPPORT ENFORCEMENT, *ET AL.*,  
*Respondents.*

On Writ of Certiorari to the United States Court  
of Appeals for the Fourth Circuit

**BRIEF AMICI CURIAE OF THE REPORTERS COMMITTEE FOR  
FREEDOM OF THE PRESS AND 53 MEDIA ORGANIZATIONS,  
INCLUDING PROMINENT PRINT, BROADCAST, AND ONLINE  
MEDIA OUTLETS, AS WELL AS LEADING JOURNALISM  
ADVOCACY ORGANIZATIONS, IN SUPPORT OF PETITIONERS**

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## STATEMENT OF INTEREST<sup>1</sup>

*Amici curiae*, described fully in Appendix A, are The Reporters Committee for Freedom of the Press and 53 media organizations — Advance Publications, Inc., A. H. Belo Corporation, Allbritton Communications Company, ALM Media, LLC, American Society of News Editors, Ars Technica, The Associated Press, Association for Alternative Newsmedia, The Association of American Publishers, Inc., Atlantic Media, Inc., Automattic, Bay Area News Group, Belo Corp., Bloomberg News, Cable News Network, Inc., The Center for Investigative Reporting, Courthouse News Service, The Daily Caller, Daily Kos, Daily News, LP, The Digital Media Law Project, Dow Jones & Company, Inc., The E.W. Scripps Company, First Amendment Coalition, Gannett Co., Inc., Grist, Hearst Corporation, MapLight, The Maryland-Delaware-District of Columbia Press Association, Matthew Lee, MPA – The Association of Magazine Media, MuckRock, The National Press Club, National Press Photographers Association, Newspaper Association of America, The Newspaper Guild – CWA, The New Yorker, The New York Times Company, North Jersey Media Group Inc., NPR, Inc., Online News Association, POLITICO LLC, Radio Television Digital

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<sup>1</sup> Pursuant to Sup. Ct. R. 37, counsel for *amici curiae* state that no party's counsel authored this brief in whole or in part; no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief; no person other than the *amici curiae*, its members or its counsel made a monetary contribution intended to fund the preparation or submission of this brief; that counsel for all parties were given timely notice of the intent to file this brief; and written consent of all parties to the filing of the brief has been filed with the Clerk of the Court.

News Association, The Slate Group, The Society of Professional Journalists, Stephens Media LLC, The Student Press Law Center, Techdirt, Time Inc., Tribune Company, Tumblr, The Washington Post, and WNET.

This case concerns an issue critical to the public and the media: whether a state can enact discriminatory citizenship requirements for individuals to access public records. As advocates for the rights of the news media who gather and disseminate information to the public, *amici* maintain a strong and ongoing interest in ensuring that journalists—as well as members of the public—have a robust right to access public records across the country, regardless of whether the individual requester is a citizen of a particular state.

Moreover, by allowing states to enact open records laws that discriminate against non-residents, the Court will be sanctioning a practice that directly harms the media's ability to gather and disseminate news that provides a full and accurate account of regional and national events. Although the individual states comprising our union are in many ways diverse, they at the same time make up a unified and interdependent body where events in one state impact and are newsworthy to citizens in other states. The outcome of this case directly bears upon the public's ability to stay informed of affairs nationwide that are of concern to all citizens and permeate the national discourse and policy debates. Thus, *amici* respectfully request that this Court reverse the decision below.

## SUMMARY OF ARGUMENT

The citizenship requirement of the Virginia Freedom of Information Act ("VFOIA") and similar statutory provisions found in Alabama, Arkansas, New Hampshire, New Jersey, and Tennessee can harm the media's ability to report on regionally and nationally significant stories and provide the public with complete and comprehensive information about the country as a whole. By largely limiting public record access in Virginia to commonwealth citizens, VFOIA inhibits the media from acquiring newsworthy records and stymies efforts to provide state-by-state comparisons on important topics such as public education, healthcare, and law enforcement activities.

By its very terms, VFOIA's media exception<sup>2</sup> forecloses access by media from most of the nation. Additionally its outdated language invites officials to discriminate against certain members of the media. Notably, the statute excepts foreign newspapers and radio and television stations that serve Virginia, yet it fails to account for burgeoning online media entities that are accessible to Virginia residents. The statute therefore discriminates against members of the media in two distinct ways: first based on their residency and second based on the form in which they disseminate news.

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<sup>2</sup> Va. Code § 2.2.-3704(A) (2012) creates a limited exception to the citizenship requirement for "representatives of newspapers and magazines with circulation in the Commonwealth, and representatives of radio and television stations broadcasting in or into the Commonwealth."

Additionally, laws in other states with citizens-only provisions similar to VFOIA's do not contain media exceptions. If this Court fails to void VFOIA's citizenship provision, it would be in effect allowing states to continue practices of preventing all out-of-state media from obtaining public records, effectively shutting out companies and persons who cannot be considered citizens of those states. Affirmance could also embolden other states to adopt similarly restrictive legislation, further inhibiting the national press corps' ability to report on matters of public importance at the local and regional level. Hence, the outcome of this case has implications beyond VFOIA and could potentially impact the public's right to access records in numerous jurisdictions.<sup>3</sup>

*Amici* are not just concerned about the vagaries of VFOIA's media exception, however. The law more broadly violates the media's rights under the Privileges and Immunities Clause of the U.S. Constitution. Our constitutional system of federalism recognizes that there are times when individuals are citizens of their respective home states and when they are citizens of one nation. The Privileges and Immunities Clause of the U.S. Constitution reinforces this structural scheme by preventing states from enacting

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<sup>3</sup> The Fourth Circuit dismissed *amici*'s concerns about the harm VFOIA posed to journalists because it noted that certain *amici* can obtain records in Virginia under the law's media exception. See *McBurney v. Young*, 667 F.3d 454, 461 n.1 (2012). Yet the Fourth Circuit misunderstood that even *amici* that might take advantage of VFOIA's media exception recognize the acute harm that the citizens-only provision poses to the ability of *all* members of the media to access public records.

laws that discriminate against individuals who live outside a state's borders.

Having access to information is fundamental to helping Americans stay informed about their government, a critical component in our nation's ability to self-govern. Indeed, as will be discussed more fully, *infra*, issues often originate in a single state before being elevated to the national stage. By allowing states to prohibit access to their records based on whether individuals are citizens of the state, coverage of important national stories could be stymied by virtue of a discriminatory citizenship requirement in a state's public records law.

Americans' historic, common law right of access to government records demonstrates that it is a fundamental right recognized under the Privileges and Immunities Clause of the U.S. Constitution. Moreover, journalism has a historic social and economic role in this country, making it a common calling protected by the Constitution. The advent of the Internet and the proliferation of online journalism outlets only further supports the conclusion that although we are a nation of states, we are more interconnected than ever. Information barriers no longer exist, and artificial ones based on arbitrary geographic lines only serve to retard the national progress that comes from a well-educated, well-informed citizenry.

Finally, Virginia cannot show that it has a substantial reason for discriminating against non-citizens, as the commonwealth has several alternative means of easing the purported administrative burdens VFOIA allegedly presents. Further, VFOIA's



discriminatory provision is antithetical to the law's purpose, which is to increase access to government records.

For these reasons, *amici* respectfully ask this Court to strike down VFOIA's citizenship provision as a violation of the Privileges and Immunities Clause.

## ARGUMENT

### **I. Virginia's citizenship requirement for access to public records dramatically harms the ability of journalists around the nation to report on matters of public importance.**

In an effort to erect a wall around government activities within the commonwealth, Virginia has enacted a citizenship requirement<sup>4</sup> that unconstitutionally discriminates against out-of-commonwealth residents seeking access to Virginia's public records. But as the Third Circuit observed, "[n]o state is an island . . . and some events which take place in an individual state may be relevant to and have an impact upon policies of not only the national government but also of the states." *Lee v. Minner*, 458 F.3d 194, 199-200 (3d Cir. 2006).

Virginia's limitation on access to its public records is an unconstitutional attempt to create such an island to the detriment of non-residents who have an

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<sup>4</sup> Va. Code. § 2.2.-3704(A) (2012).

interest in the commonwealth's activities, such as the Petitioners in the present case and *amici*.<sup>5</sup>

Although some *amici* may qualify for VFOIA's media exception, they are just as concerned as are other *amici* about the law because its precise contours have not been defined<sup>6</sup> and at least five other states' statutory records laws reference citizenship requirements that lack media exceptions.<sup>7</sup> Further, if this Court were to sanction VFOIA's discrimination against non-citizens, it could invite other states to add similar prohibitions in their laws, severely limiting the amount of information made available to regional and national media.

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<sup>5</sup> Virginia residents themselves also lose under such a restriction because they do not obtain the benefit of macro-level, comparison reporting that incorporates Virginia issues or legal and policy perspectives.

<sup>6</sup> *Amici* are unaware of any Virginia court interpretation of what "circulation in the Commonwealth" means for purposes of online media.

<sup>7</sup> Those states include Alabama – Ala. Code § 36-12-40 (2012); Arkansas – Ark. Code § 25-19-105 (2012); New Hampshire – N.H. Rev. Stat. § 91-A:4 (2012); New Jersey – N.J. Stat. § 47:1A-1 (2012); Tennessee – Tenn. Code § 10-7-503 (2012). Delaware's statute, Del. Code tit. 29, § 10003 (2012), was declared unconstitutional by the Third Circuit, see *Lee*, 458 F.3d 194, and the state legislature subsequently amended the law to remove the citizenship requirement. 78 Del. Laws Ch. 382 (2012).

**A. Affirming the Fourth Circuit would limit reporting on issues in Virginia and throughout the country.**

Limiting access to state records in Virginia and elsewhere to only those citizens located within a particular state would diminish the amount of quality reporting<sup>8</sup> disseminated to the public and ultimately harm the ability of individuals to make informed decisions about their government.

As the examples discussed *infra* show, a great deal of important regional and national news is derived from public records, including 50-state surveys on topics such as homeland security spending and education. Additionally news commonly defies state borders, creating situations in which non-citizens feel the impact of events occurring just across state lines. This undercuts Virginia's justification that only its citizens care about Virginia government records. And as other examples show, Virginia's importance in terms of national news cannot be understated, as its businesses, political figures, and government regularly make headlines across the country.

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<sup>8</sup> See Brooke Barnett, Note, *Use of Public Records Databases in Newspaper and Television Newsrooms*, 53 FED. COMM. L.J. 557, 558 (2001) ("If legislatures restrict that access, not only would some stories prove more difficult or expensive to report, or be reported less completely, accurately, or quickly, but reporters would miss altogether those stories that result from routine searching of public records—so-called 'enterprise stories.'").

- i. **VFOIA's citizenship requirement jeopardizes state-by-state comparisons of national news.**

Reporters often use public records compiled from a number of states to create important stories about regional or national issues or to put local events into a broader context. By placing barriers on non-resident journalists' ability to access public records, VFOIA and similar laws create gaps in such comparisons, leading to incomplete reporting that fails to provide the public with a full picture of events.

For example, using public records from federal and state governments, *The Washington Post* in 2010 presented a comprehensive picture of a national domestic intelligence program where local, state, and federal law enforcement agencies work together in cities throughout the country to collect information about Americans through "fusion centers." See Dana Priest and William M. Arkin, *Monitoring America*, WASH. POST, Dec. 20, 2010, available at 2010 WLNR 25809847.<sup>9</sup>

The story revealed that local law enforcement agencies across the country were using equipment and technology created for battlefields in their domestic surveillance efforts. *Id.* It also reported that some state intelligence reports generated for the fusion centers came from investigating citizens engaged

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<sup>9</sup> To facilitate access to secondary sources, "WLNR," or Westlaw NewsRoom, citations are provided whenever possible.

in lawful, constitutionally protected activities, such as attending meetings. *Id.*

The *Washington Post* and other media<sup>10</sup> accounts on fusion centers increased awareness about the link between local and federal domestic surveillance efforts and its financial and social costs. The heightened scrutiny led to a critical Senate report that found that the fusion centers improperly collected information about Americans and produced little valuable intelligence about terrorism. See Matt Apuzzo and Eileen Sullivan, *Senate Report Blasts Intelligence Program: Homeland Security Had Info on Citizens Instead of Terrorists*, THE ASSOCIATED PRESS, Oct. 3, 2012, available at 2012 WLNR 21048221.

Reporters have also compiled public records from multiple states to explore the impact of the “No Child Left Behind” initiative on the behavior of teachers. Reviewing hundreds of “misadministration” and “irregularity” reports filed with the state Departments of Education in Florida, California, and Arizona, *USA Today* detailed incidents of missing standardized test booklets and teachers whispering answers to students during testing. See Jodi Upton, Denise Atmos & Anne Ryman, *For Teachers, Many Ways and Rea-*

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<sup>10</sup> See, e.g., Kevin Dilanian, *‘Fusion Centers’ Sharing Even Nonterrorism Data*, CHI. TRIB., Nov. 15, 2010, available at 2010 WLNR 22769712; Michael Peltier, *‘Turn in Your Neighbor’ Program in Florida Worries ACLU Official*, ORLANDO SENTINEL, Sept. 4, 2011, available at 2011 WLNR 17536998; Marissa Taylor, *As Terrorism Tips Spike, Collection of Data Raises Privacy Concerns*, MCCLATCHY NEWSPAPERS, May 8, 2011, available at 2011 WLNR 9201880.



*sons to Cheat on Tests*, USA Today, Mar. 10, 2011, at A1, available at 2011 WLNR 4717508.

The story further revealed that events occurring within each state were not isolated but instead were part of a national trend as educators attempted to deal with the high-stakes testing in which poor results were seen as a reflection of a teacher's competence, a school's credibility, and a state's commitment to education. *See id.*

Similarly, *ProPublica*, a Pulitzer Prize-winning nonprofit news organization that produces investigative journalism in the public interest, used state health records from California, New York, North Carolina, Ohio, Pennsylvania, and Texas to reveal wide disparities in the conditions in which dialysis patients received medical care. *See* Robin Fields, *In Dialysis, Life-Saving Care at Great Risk and Cost*, PROPUBLICA, Nov. 9, 2010.<sup>11</sup>

*ProPublica* then used the records to create a database that tracked and quantified a variety of problems at more than 1,500 dialysis centers across the country, including unsanitary and unsafe conditions, prescription errors, infection control breaches, and serious patient safety lapses.

Additional examples of the type of high-impact, bird's-eye view reporting published when reporters have access to public records in multiple states include a 2009 investigation by the *Columbus Dispatch*

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<sup>11</sup> The story and others in the series are available at <http://www.propublica.org/series/dialysis>.

that revealed uneven and inappropriate application of the Family Education Rights and Privacy Act to shield access to college athletic records discussing student-athletes' criminal behavior, academic cheating incidents, and recruiting violations.<sup>12</sup> And in 1997, the *Kansas City Star* filed public records requests in several states for an investigation into the NCAA's lax safety measures for college athletes and how the hands-off approach may have contributed to the death of athletes at major universities.<sup>13</sup>

Without access to records from any one of the states above, reporters would not have been able to gain important context about newsworthy events, and the magnitude of the problems discovered may never have come to light. By comparing records from several states, reporters were able to understand whether certain activities were isolated within a state or part of a larger regional or national trend. And by being able to draw upon records from many different states, the stories were able to underscore the importance of the issue and elevate it to a national audience.

The presence of a citizenship requirement in any of the public records laws used by these reporters to gain access to records would have substantially

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<sup>12</sup> See Jill Reipenhoff & Todd Jones, *Secrecy 101: College Athletic Departments Use Vague Law to Keep Public Records from Being Seen*, THE COLUMBUS DISPATCH, May 31, 2009, available at 2009 WLNR 10328545.

<sup>13</sup> See Steven Rock, *System Puts Players at Risk: NCAA Doesn't Require Medical Supervision*, THE KANSAS CITY STAR, Oct. 8, 1997, available at 1997 WLNR 6454162.

weakened their journalism or prevented them from getting a handle on the scope of the problem. Effectively, one state could frustrate the media's role to find compelling, important stories that affect people across state lines by undercutting reporters' abilities to access public records.

**ii. News in one state is generally of interest to non-citizens.**

Although Virginia officials argue that only Virginians are concerned about the actions of the commonwealth's government, the practical reality is that events occurring within a state often do not cease being news at its borders. Today, metropolitan regions frequently cross state lines (along with the commuters who work in one state yet live in another), blurring geographic boundaries. The examples discussed below show that, often, individuals living near state borders or in metropolitan areas have an interest in events occurring across state lines.

A 2011 story by the *Kansas City Star* detailed how conflicting state gambling laws and lax enforcement on the Kansas side of Kansas City created competition between "gray machines" and gambling operations on the Missouri side of the city. See Mike Hendricks, *Crackdown looms for illegal slots, poker machines*, KANSAS CITY STAR, Dec. 25, 2011, available at 2011 WLNR 26673774.

The story recounts how, although Kansas has a state law prohibiting slot machines, many bars and clubs operate machines that allow players to win credits and later redeem them for money. These ma-

chines are directly across the river from Missouri, where riverboat casinos operate and are a central part of the state's economy. *Id.* The story also notes that officials in both Kansas and Missouri have no idea how much money changes hands when people play the gray machines. *Id.*

The story impacts citizens of both Kansas and Missouri because it demonstrates how lax enforcement of Kansas law has created an industry that competes with legitimate, taxed gambling in Missouri. As a result, citizens from both states may be using the gray machines to the detriment of Missouri's tax base, reducing the level of government services the state can provide.

The Mississippi River may separate St. Louis from Illinois, but the boundary did not appear to stop then-Illinois governor George Ryan from trying to draw Major League Baseball's St. Louis Cardinals across the river in 2003. Relying on records received from the Illinois governor's administration, the *St. Louis Post-Dispatch* recounted how Illinois state officials tried to persuade the team to move as talks between the team and Missouri and St. Louis officials about a new stadium broke down, despite Illinois officials publicly stating that they were not getting involved. *See Memos Reveal Political Favors*, ST. LOUIS POST-DISPATCH, Nov. 16, 2003, available at 2003 WLNR 1764676.

The story was of interest to more than die-hard Cardinals fans, as the team's move to Illinois would have shifted jobs, services, and millions of dollars in tax revenue to an entirely different state.

In another example, the densely packed urban corridor around Philadelphia has seen increased residential development in New Jersey. The interconnected nature of the region prompted the *Philadelphia Inquirer* to cover the New Jersey legislature as it grappled with whether to create limits on sewer service, which would slow growth in the state. See Sandy Bauers, *Environmentalists Oppose N.J. Bid to Put Off Limits on Sewers*, PHILADELPHIA INQUIRER, Jan. 9, 2012, available at 2012 WLNR 558446.

The news was likely of interest to *Inquirer* readers who live just across the Delaware River because many of the future New Jersey residents who would live in the developments would work in Philadelphia. It is also likely that many of the businesses based in Philadelphia would benefit from the influx of additional workers and customers.

Northern Virginia is yet another example of how geographic boundaries blur in a metropolitan area. In 2011, more than 42 million people flew through the Washington, D.C region's two major airports in Vir-



ginia,<sup>14</sup> with many of those passengers living in the District or Maryland.

The growth of Reagan National Airport in recent years has created regional interest among those who live just across the Potomac as the airport transitions into a mini-hub, resulting in extremely long security lines and the inability of the airport to increase its physical footprint amid cramped conditions. See Ashley Halsey III, *More Flights, More Fliers Strain National Airport*, WASH. POST, Sept. 23, 2012, available at 2012 WLNR 20238501.

The stories above show that interest in a state government's activities often spills across the border, affecting individuals who live nearby but commute to the state daily for work. VFOIA and similar laws contemplate a world in which the acts of state governments are of no interest to those living outside its borders. But as shown here, non-citizens have a substantial interest in such activities, and VFOIA creates an impediment for non-residents to learn about news that concerns them.

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<sup>14</sup> Dulles International Airport had more than 23 million people fly through it in 2011 while Reagan National Airport had nearly 19 million. See Washington Dulles International Airport (IAD) Air Traffic Statistics, available at <http://www.metwashairports.com/dulles/653.htm> (last visited Dec. 4, 2012); Ronald Reagan Washington National (DCA) Air Traffic Statistics, available at <http://www.metwashairports.com/reagan/1279.htm> (last visited Dec. 4, 2012).

**iii. News originating in Virginia is regularly of national significance.**

Just as news about a state is often of interest to non-citizens living nearby, Virginia in particular routinely makes national news. Whether it is the Attorney General's lawsuit challenging the Affordable Care Act, a college campus shooting tragedy, or the finance, defense, and high technology businesses that call the commonwealth home, events occurring within Virginia frequently interest the rest of the country. VFOIA's citizens-only requirement hinders efforts by national news reporters to cover these events.

Virginia Attorney General Ken Cuccinelli made national headlines when, minutes after President Barack Obama signed the Affordable Care Act into law in March 2010, he filed a lawsuit challenging its constitutionality. See Steven Thomma and David Lightman, *Obama Signs Historic Health Care Overhaul into Law*, MCCLATCHEY NEWSPAPERS, Mar. 23, 2010, available at 2010 WLNR 6054040.

Media across the country followed the case as it worked its way through the courts. See Kevin Sack, *Battle Over Health Care Law Shifts to Federal Appellate Courts*, N.Y. TIMES, May 9, 2011, available at 2011 WLNR 9176187; David G. Savage, *Appeals Court Rejects Challenges to Obama's Health Care Overhaul*, CHI. TRIB., Sept. 9, 2011, available at 2011 WLNR 17864110.

The suit raised Cuccinelli's profile nationally, including speculation that he may run for the U.S. Senate. See Editorial, *Ken Cuccinelli: National Pro-*

*file*, RICHMOND TIMES-DISPATCH, Jan. 5, 2011, *available at* 2011 WLNR 243436 (“Cuccinelli may be the GOP’s most compelling figure – at least for the time being.”). It also led to the filing of a VFOIA request to discover the litigation’s costs. See Olympia Meola, *Democrats File Request for Cuccinelli Expenses*, RICHMOND TIMES-DISPATCH, March 24, 2010, *available at* 2010 WLNR 6138263. A non-citizen would not have been able to request those records because of VFOIA’s citizens-only provision.

The 2007 shootings at Virginia Polytechnic Institute and State University prompted national headlines as media from across the country descended on the campus to learn how the tragedy occurred and what steps were being taken to prevent similar acts in the future.

In the aftermath of the shootings, colleges across the country re-examined their safety procedures and the shootings are often discussed in national stories about gun use and campus safety. See Stephanie Ebbert, *Colleges Reviewing Security Policies; Shootings Prompt Questions from Student Prospects*, THE BOSTON GLOBE, Feb. 16, 2008, *available at* 2008 WLNR 3165951; Bruce Baron, Editorial, *Campus Safety is Everyone’s Responsibility and Concern*, THE (San Bernardino County) SUN, Mar. 8, 2011, *available at* 2011 WLNR 4538489; Bruce Shipkowski, *Legislators Tout Campus Safety*, THE (Trenton) TIMES, Aug. 30, 2010, *available at* 2010 WLNR 17259247.

The records detailing the shootings and their aftermath—which provide the public with a full account of what occurred—are subject to VFOIA, as

Virginia Tech is a public school. But despite the overwhelming national interest in the events that occurred at Virginia Tech, a reporter who is not a citizen of the commonwealth or cannot take advantage of the limited media exception, would not be legally entitled to such records.

Non-citizens also have a great deal of interest in news about businesses that are based in or have a substantial presence in Virginia, which is home to 24 Fortune 500 companies<sup>15</sup> and several divisions of major multinational corporations such as Airbus, Volkswagen, Rolls-Royce, and Siemens.<sup>16</sup> One notable Fortune 500 company based in Virginia is mortgage finance giant Freddie Mac, the federal bailout of which generated national headlines and became symbolic of the recent recession. *See* Stephen Labaton & Edmund L. Andrews, *Mortgage Giants Taken over by U.S.*, N.Y. TIMES, Sept. 8, 2008, at A1, available at 2008 WLNR 17004719.

With its proximity to the nation's capital, Virginia is also home to roughly 4,000 registered defense contractors and ranks second nationwide in the number of U.S. Department of Defense prime defense contractors. *See* Mali R. Schantz-Feld, *Virginia*, AREA DEV.

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<sup>15</sup> *See* 2012 Fortune 500 company listing for Virginia, available at <http://money.cnn.com/magazines/fortune/fortune500/2012/states/VA.html>.

<sup>16</sup> *See generally* VA. ECON. DEV. P'SHIP, INTERNATIONALLY OWNED COMPANIES IN VIRGINIA (2009–2010), available at [http://www.yesvirginia.com/pdf/Internationally\\_Owned\\_Companies.pdf](http://www.yesvirginia.com/pdf/Internationally_Owned_Companies.pdf).

SITE & FACILITY PLANNING, Apr. 1, 2006, *available at* 2006 WLNR 7417919.<sup>17</sup>

These Fortune 500 companies and defense contractors regularly interact with local governments, generating records subject to VFOIA that are of immense interest to the public generally as well as to shareholders of the companies. For example, Boeing's recent plans to build a corporate office complex in the Crystal City section of Arlington, VA<sup>18</sup> likely generated many records, including architectural plans, possible zoning changes, and building permits, that may be newsworthy to many people living outside of Virginia because they could affect many other local job markets where Boeing has offices.<sup>19</sup>

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<sup>17</sup> The report notes that every major federal defense contractor has a presence in Virginia and that since Sept. 11, 2001, several homeland security and defense companies, including SAIC, General Dynamics, Northrop Grumman, Lockheed Martin and Boeing, have invested more than \$1 billion in new or expanding business in the commonwealth, particularly in its northern region.

<sup>18</sup> See Marjorie Censer & Jonathan O'Connell, *Boeing Ramping up D.C. Presence*, WASH. POST, Mar. 7, 2011, at A9, *available at* 2011 WLNR 4418885.

<sup>19</sup> Regional and national interest in state public records generated by large-scale corporate developments is easy to see, given that records detailing the size, complexity, and number of employees expected for a particular location could impact jobs at competing sites throughout the country. This is particularly true in the mid-Atlantic and Southern regions of the country, where major automotive manufacturers have increasingly relocated their plants or built new ones. See Dan Chapman, *Georgia town hopes to benefit from VW*, ATLANTA JOURNAL-CONSTITUTION, May 17, 2009, *available at* 2009 WLNR 9389042.



The above examples demonstrate not only that events in Virginia are often relevant nationally, but also that complete reporting on those events requires access to records through use of VFOIA. Yet the law's citizenship requirement prevents a large majority of the media from accessing these records and, by extension, delivering a full report to interested members of the public.

**B. Media, particularly online platforms, cannot rely on the limited media exception in VFOIA because other state open records laws do not include similar exceptions and affirming the Fourth Circuit could push other states to similarly restrict access to their public records.**

The media exception to VFOIA does not save the law's discriminatory impact. Rather, it exacerbates the problem because it invites officials to make *ad hoc* applications of the rule to out-of-state press under a statute that fails to account for new forms of media. Contrary to the Fourth Circuit's appraisal that VFOIA's media exception alleviates any harm to potential media members, the law fails to account for a shifting media landscape in which traditional media are joined by ever-growing and diverse online media.

The statute's exception to VFOIA's citizenship requirement is limited to "representatives of newspapers and magazines with circulation in the Commonwealth, and representatives of radio and television stations broadcasting in or into the Commonwealth."

Va. Code § 2.2-3704(A). Applying the statute to media outside of Virginia raises distinct legal problems that, if VFOIA is upheld, would directly harm the media's ability to fulfill its watchdog role.

When interpreting the statute there is a threshold question of whether online media would qualify for the exception as do certain newspapers, magazines, and broadcasters.<sup>20</sup> *Amici* could find no cases applying the exception to online media. A straightforward reading of VFOIA's media exception would leave out online media, as they do not circulate in a tangible print form similar to magazines or broadcast over the air similar to television news. Such an interpretation would discriminate against certain media purely on the basis of the form in which they deliver news.

Even if Virginia officials interpreted the media exception broadly by reading "circulation" to include online media outlets that are read by the commonwealth's residents, officials would still need to determine whether particular online media qualify for the exception. The Internet allows anyone to gather and disseminate news and the FCC has recognized that these independent journalists are as necessary as the professional media in today's communications landscape.<sup>21</sup>

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<sup>20</sup> Book authors also are unlikely to qualify for the exception, as VFOIA does not mention them.

<sup>21</sup> STEVEN WALDMAN, WORKING GROUP ON INFORMATION NEEDS OF COMMUNITIES, FED. COMM. COMM'N., THE INFORMATION NEEDS OF COMMUNITIES 30 (2011).

But would an individual blogger with a website be entitled to the media exception in the same way as a contributor to the *Huffington Post*, an online news site that has won a Pulitzer Prize? If Virginia officials determine that any non-resident who seeks to gather news would qualify for the exception, it would swallow VFOIA's citizens-only requirement, an unlikely outcome given Respondent's actions in the present case.

On the other hand, if officials begin granting exceptions to particular online media but not others, the officials would be privileging certain members of the media without any clear standards, creating a *de facto* media licensing scheme for access to Virginia records. This would raise serious First Amendment problems by granting overly broad discretion to public officials to determine which members of the media have the right to access Virginia public records.<sup>22</sup> See *Grosjean v. American Press Co.*, 297 U.S. 233, 249-50 (1936) (quoting 2 T. Cooley, *Constitutional Limitations* 886 (8th ed. 1927)):

The evils to be prevented were not the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens.

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<sup>22</sup> See Charles Bonner, Jean Paul Jones, and Henry M. Kohnlein, *Annual Survey of Virginia Law*, 33 U. RICH. L. REV. 727, 731 (1999) (noting that VFOIA's media exception could raise prior restraint concerns under the First Amendment).

*See Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 130 (1992) (licensing schemes “may not delegate overly broad licensing discretion to a public official.”); *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750 (1988) (danger from censorship “is at its zenith with the determination of who may speak and who may not is left to the unbridled discretion of a government official”).

Allowing officials to inquire into the type of media seeking records under VFOIA would also conflict with the statute itself, as officials cannot scrutinize a requestor’s purpose. *See Associated Tax Service, Inc. v. Fitzpatrick*, 372 S.E.2d 625, 236 Va. 181 (1988).

Finally, because other states with laws similar to VFOIA do not have a media exception, a finding that such laws do not offend the Privileges and Immunities Clause could embolden officials across the country to pass similarly restrictive laws.<sup>23</sup> This would undoubtedly decrease the number of records media could access and thus report on, harming the public’s ability to learn about government.

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<sup>23</sup> Officials could also pass laws that restrict access to records from all three branches of state governments, as state open records laws vary in their application. For example, Connecticut’s FOI law applies to executive branch agencies, the state legislature, and the administrative functions of state courts. Conn. Gen. Stat. §1-200(1) (2012). In contrast, California has a separate law governing access to legislative records, Cal. Gov’t Code § 9070, *et seq.* (2012), and administrative court records are governed by Cal. Rules of Court 10.500 *et seq.* An adverse decision could therefore lead state officials to restrict access to an entire series of state records, not just from state administrative branch agencies that are traditionally thought of as being subject to public records laws.

VFOIA's media exception intensifies the harm to media because it allows officials to determine, *ad hoc*, whether certain requesters gain the benefit of the exception. This would dramatically undercut the media's ability to gather and disseminate news about Virginia and would allow officials to determine which members of the media can access records in a scheme that conflicts with the principles behind the Free Press Clause of the First Amendment.<sup>24</sup>

**II. VFOIA's citizens-only requirement violates the Privileges and Immunities Clause because it burdens the fundamental right to access records of the government and prevents out-of-state companies and individuals from engaging in the common calling of journalism.**

VFOIA and similar laws burden two separate fundamental rights—the provision discriminates against U.S. citizens' fundamental right to access information about government and prevents non-citizens from engaging in the common calling of journalism. A law violates the Privileges and Immunities Clause of the U.S. Constitution if it burdens a fundamental right, the state has no substantial reason for the law, and there is no substantial relationship between the discrimination and the law's objectives. *See Toomer v. Witsell*, 334 U.S. 385, 396 (1948); *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 284 (1985).

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<sup>24</sup> See *Near v. Minnesota*, 283 U.S. 697, 716-20 (1931) (discussing the historic understanding that the Press Clause prevents prior restraints).



Virginia and states with laws similar to VFOIA have no substantial reason for discriminating against non-citizens because they can lawfully charge fees to address concerns about the administrative burdens created by non-citizen requests. Finally, the discriminatory practice bears no substantial relationship to the purpose of VFOIA, which is to open up Virginia government to public scrutiny.

**A. The right to access government records is a fundamental right established by common law that predates statutory grants such as VFOIA.**

The right of individuals to access public records has long been part of the common law and is fundamental to ensuring that the nation's citizens have the ability to make informed decisions about their government. For purposes of the Privileges and Immunities Clause, fundamental rights are those rights recognized as "sufficiently basic to the livelihood of the Nation." *Baldwin v. Fish & Game Comm'n of Mont.*, 436 U.S. 371, 388 (1978). Common law access rights to public records have been recognized for centuries<sup>25</sup> and were viewed as essential to ensuring that the sovereignty of the people continued to flourish as citizens made informed decisions about the future of their government.

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<sup>25</sup> The longstanding common law access right to court records was recognized by this Court in *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589 (1978).

With roots in English common law,<sup>26</sup> American courts have long recognized the right to inspect government records. As Michigan Supreme Court Justice Allen Morse wrote in 1889, "I do not think that any common law ever obtained in this free government that would deny to the people thereof the right of free access to and public inspection of public records." *Burton v. Tuite*, 44 N.W. 282, 285 (Mich. 1889). Virginia itself recognizes the common law right to access records, as an 1891 decision held that such rights were "well defined and understood." *Clay v. Ballard*, 13 S.E. 262, 263 (Va. 1891). An Indiana court recognized in 1900 that a common law right of access was essential for an individual "to ascertain if the affairs of his country have been honestly and faithfully administered by the public officials charged with that duty." *State ex rel. Colescott v. King*, 57 N.E. 535, 537 (Ind. 1900).<sup>27</sup>

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<sup>26</sup> See, e.g., *Herbert v. Ashburner*, 95 Eng. Rep. 628, 628 (1750) ("These are public books which every body has a right to see..."); *King v. G. Babb*, 100 Eng. Rep. 743 (1790); *Rex v. Guardians*, 109 Eng. Rep. 202, 202 (1829) ("Every inhabitant rated, or liable to be rated, has an interest in seeing whether the expenditure of the parish money has been proper. Consequently he has a right to inspect the books in which the account of such expenditure is contained."). For further discussion of reported English cases discussing common law rights of access to public records, see *Nowack v. Fuller*, 219 N.W. 749, 750-51 (Mich. 1928); *Wellford v. Williams*, 75 S.W. 948, 954-56 (Tenn. 1903).

<sup>27</sup> Michigan's Supreme Court understood that the right to access records served as an expedient to government accountability when it held that a newspaper editor had the common law right "to inspect the public records in the auditor general's office, to determine if the public money is being properly expended." *Nowack*, 219 N.W. at 751.

To be sure, most states and the federal government have codified access rights that serve as the primary means by which individuals can obtain public records today. But it would be a mistake to read recently created statutory rights as an indication that the founders did not believe that free and open government information played a fundamental role in the nation's self-governance.<sup>28</sup> Instead, the statutory grants are better viewed as a codification of the common law right to access government information.<sup>29</sup> Even in states where access rights exist by statute, some courts still recognize a distinct common law right as well.<sup>30</sup>

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<sup>28</sup> See *Biddle v. Walton*, 6 Pa. D. 287 (Pa. Ct. Comm. Pl. 1897) (holding that the right to access municipal documents in the U.S. was already "regarded as settled law in this country" and citing cases upholding similar common law rights in New York, New Jersey and Missouri).

<sup>29</sup> This principle is illustrated by two state court decisions. The Vermont Supreme Court has held that "[t]he common law has established the right in all citizens to inspect the public records and documents made and preserved by their government when not detrimental to the public interest." *Matte v. City of Winooski*, 271 A.2d 830, 831 (Vt. 1970) (citing *Clement v. Graham*, 63 A. 146 (Vt. 1906)). Such common law rights are now simply "confirmed by statute with limited exceptions where considerations of public policy and necessity require some restraint." *Id.* Similarly, the Wisconsin Supreme Court has held there to be a right of access to arrest records grounded in statutory law that the court found as implementing rights previously established at common law. See *Newspapers, Inc. v. Breier*, 279 N.W.2d 179, 183 (Wis. 1979).

<sup>30</sup> See *S. Jersey Publ'g. Co. v. N.J. Expressway Auth.*, 591 A.2d 921, 927 (N.J. 1991) (citing *Ferry v. Williams*, 41 N.J.L. 332

Citizens have long held a common law right to view public records that predate statutory grants through VFOIA and similar laws. Moreover, such access rights were seen as fundamental to self-governance.

**B. The common calling of journalism has long been recognized as a fundamental institution.**

Journalism is a common calling under the Privileges and Immunities Clause because it plays an essential role in the nation's economy by providing a robust national media industry and also furthers the social good of the nation by providing citizens with important news.<sup>31</sup>

To determine whether a pursuit is classified as a common calling, this Court has measured the role of the activity in the economy by looking at whether it is "important to the national economy," *Piper*, 470 U.S. at 281, or "sufficiently basic to the national economy." *Supreme Court of Va. v. Friedman*, 487 U.S. 59, 66 (1988); see *Piper*, 470 U.S. at 288 (holding the prac-

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(N.J. 1879) (holding that the long-recognized common law right to access public records and the state's public records law are not mutually exclusive and complement each other); *Casey v. MacPhail*, 65 A.2d 657 (N.J. Super. Ct. Law Div. 1949)).

<sup>31</sup> Congress recognized the benefits of the press when it passed the Newspaper Preservation Act of 1970. Pub. L. 91-353, § 2, 15 U.S.C. § 1801 (2012) (declaring that there is a public interest in "maintaining a newspaper press editorially and reportorially independent and competitive in the United States").

tice of law to be a protected pursuit); *United Bldg.*, 465 U.S. at 222–23 (constitutionally protecting construction contracting); *Toomer*, 334 U.S. at 403 (finding commercial shrimping to be a common calling).

Journalism's importance to the national economy and commercial intercourse is evident through the sheer number of news outlets and organizations and their circulation, viewership, and online visitor figures. Further, the media is a major source of information on economic and financial issues.

This “Court has never held that the Privileges and Immunities Clause protects only economic interests.” *Piper*, 470 U.S. at 282 n.11. The “noncommercial role and duty” of an activity is equally relevant to whether a pursuit falls “within the ambit” of the Privileges and Immunities Clause. *Id.* at 281. Journalists do more than sell a product—they provide the public news and information to serve as a basis for discourse and debate. The combined historic, economic, and social role that the media have established since the nation's founding demonstrates that journalism is a common calling protected by the Privileges and Immunities Clause.

**C. Virginia does not have a substantial reason for discriminating against non-citizens under VFOIA.**

To withstand scrutiny under the Privileges and Immunities Clause, Virginia must show that it has a substantial reason for the discriminatory practice. *Toomer*, 334 U.S. at 396. Virginia's reasons for limiting access to public records to its citizens under



VFOIA are not substantial enough to justify its discrimination against non-citizens.

Virginia has summarily claimed that it must prevent non-citizens from accessing its records under VFOIA because otherwise it would be overburdened by a flood of record requests and that commonwealth taxpayers would be stuck with the costs of processing those requests.<sup>32</sup>

Yet Virginia has other, much less restrictive means available to it to prevent this alleged, yet unsubstantiated, harm. They include collecting fees from non-citizen requesters as permitted under Va. Code § 2.2-3704(F), which allows commonwealth officials to charge requesters for the actual costs associated with the time expended to search, access, duplicate, or supply the records. The fee collection provision applies to all requests under VFOIA, including those made by the media. No realistic fear exists that Virginia governments will be inundated with unchecked out-of-state requests.

Additionally, Virginia officials could also ensure that personnel are properly trained and that requesters are better informed of how to file proper, clear requests so they can be processed more efficiently. Virginia's own Freedom of Information Coun-

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<sup>32</sup> Virginia has argued that non-citizen requests use up the time and effort of public officials when processing such requests, but does not provide any evidence about the costs of responding to non-citizen requests or how many requests the state receives from parties outside the commonwealth. See *Joint Resp. Br. of Defs.-Appellees*, at 41-42, *McBurney*, No. 11-1099 (4th Cir. 2011).

cil, a commonwealth agency, recommends that agencies put routinely requested records online and employ good records management practices for efficient FOIA processing. *See Taking the Shock out of Charges: A guide to allowable charges for record production under the Freedom of Information Act.*<sup>33</sup> Such best practices not only facilitate increased access to records but also help agencies make better use of their resources. These practices, if implemented, would undoubtedly decrease Virginia's administrative burden without discriminating against non-citizens.

More broadly, the alleged increased burden Virginia would suffer as a result of processing non-citizen VFOIA requests fails to acknowledge that open government is a policy goal with ends unto itself, promoting transparency and confidence in the activities of elected officials. VFOIA should therefore not be viewed as a burden on public officials, as it is an essential part of the government's mission.

**D. Virginia's VFOIA citizenship restriction bears no nexus to its stated objective of opening government to the people.**

VFOIA's discrimination against non-citizens seeking information about Virginia's government does not have a substantial relationship to the statute's stated government transparency objectives.

VFOIA plainly states that its policy objective is "to promote an increased awareness by all persons of

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<sup>33</sup> The document is available at <http://foiacouncil.dls.virginia.gov/ref/FOIACCharges.pdf>.

governmental activities,” giving individuals “every opportunity . . . to witness the operations of government.” Va. Code § 2.2-3700(B) (2011).

Yet, VFOIA clearly fails to advance this objective with its citizens-only provision, as it stands in complete contrast to the policy of “ready access” embodied within. *Id.* Journalists, no matter where they reside and where their works are published or broadcast, publicize government actions of interest to the public by acting on behalf of all persons. The citizens of Virginia and of the United States are clearly better served if more sources of news about government are available to the public, which is the precise purpose of VFOIA.

Because there is no nexus between Virginia’s discriminatory practice under VFOIA and the law’s stated purpose, it violates the Privileges and Immunities Clause and must be held unconstitutional.

**III. Affirming the Fourth Circuit’s decision would thwart the goal of the Privileges and Immunities Clause to forge a national identity and undercut the media’s historic role as a government watchdog.**

VFOIA’s citizenship requirement also violates the Privileges and Immunities Clause of the U.S. Constitution because it allows the commonwealth to withdraw itself from national scrutiny while discriminating against non-citizens. Additionally, VFOIA and similar laws burden the media by prohibiting them from serving as surrogates for the public and as a check on the power of government.

The Privileges and Immunities Clause as a whole was intended to “fuse into one Nation a collection of independent, sovereign States.” *Toomer*, 334 U.S. at 395. The press plays an essential role in furthering the goal of the Privileges and Immunities Clause by weaving together stories from across the country to inform Americans and enable them to self-govern.

The Privileges and Immunities Clause’s purpose has been furthered by the increased presence of new forms of content published on the Internet, both by traditional and new media, which allow people across the country to consume news, connect, and share their views. As more Americans acquire their news through the Internet rather than through print or broadcast radio,<sup>34</sup> traditional geographic barriers are breaking down and national online communities are taking their place.

This Court has long recognized that one of the fundamental roles of the press, established by the First Amendment, was to serve as a watchdog for the people over their government. Justice Black in his concurrence in *N.Y. Times v. United States*, 403 U.S. 713, 717 (1971) wrote that:

In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. [ . .

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<sup>34</sup> See PEW RESEARCH CENTER FOR THE PEOPLE & THE PRESS, INTERNET GAINS ON TELEVISION AS PUBLIC’S MAIN NEWS SOURCE (2011) (noting that since 2007 the percentage of Americans who report getting their news from online sources increased from 24 percent to 41 percent).

. ] The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government.

VFOIA and similar citizenship provisions found in open records statutes impose direct restraints on the press because they prevent out-of-state media from obtaining records about state government. Undoubtedly, less effective government oversight results from these laws.

VFOIA and similar laws also give state officials greater control over who can access public records to the detriment of the media and the general public. This means that a state may be able to prevent disclosure of important events concerning state government that impact the nation as a whole. An illustrative example of this potential harm is *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964), in which a series of large libel judgments against the newspaper could have bankrupted it and deterred national reporting on race relations in the southern states.<sup>35</sup>

In his concurrence in *Sullivan*, Justice Black recognized this potential harm, noting that “[t]he half-million dollar verdict does give dramatic, proof, however, that state libel laws threaten the very existence of an American press virile enough to publish unpopular views on public affairs and bold enough to criticize the conduct of public officials.” *Id.* at 294. Black

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<sup>35</sup> The practical implications of the judgment pending in the case, as well as other suits brought against the newspaper, are detailed in ANTHONY LEWIS, *MAKE NO LAW* (1991).



went on to describe how there were eleven libel suits pending against the *Times* and another five pending against *CBS*, who were seen as “outside agitators.” *Id.* at 294-95.

Allowing the libel judgments against the *Times* and *CBS* to stand would have meant that a state could prevent outside media, and by extension the rest of the nation, from learning about events occurring within its borders. Coverage of the civil rights movement by the national press was influential in educating all Americans about the struggles to desegregate.<sup>36</sup> VFOIA and similar laws can create a like situation in that they allow state governments to control the information they release to outside media working to inform the entire nation.

The Third Circuit in *Lee v. Minner*, 458 F.3d 194 (2006) understood the fundamental role access to information plays in civic engagement and the danger citizens-only provisions in state public records laws represent to maintaining an informed electorate. The court recognized that “[e]ffective advocacy and participation in the political process [ . . . ] require access to information.” *Id.* at 199.

In the present case, the Fourth Circuit distinguished *Lee*’s reasoning by scrutinizing the actual VFOIA requests made by Petitioners and determining that their requests concerned “information of *personal* import rather than information to advance the interests of other citizens or the nation as a whole, or that is of political or economic importance.” *McBur-*

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<sup>36</sup> See *id.*

*ney v. Young*, 667 F.3d 454, 465 (2012) (emphasis in original).

This distinction is problematic for several reasons. First, the Fourth Circuit appears to believe that a VFOIA request by a private citizen concerning personal affairs cannot serve the public interest. Yet even a private request could reveal compromising information about the government that causes it to change its behavior, resulting in a public benefit.

The Fourth Circuit also seems to imply that an individual making a request as part of a business has a singularly private interest in the records. This cannot be the law, as members of the for-profit media have commercial interests in the requests they file, but also provide an important contribution to the public by informing it about the affairs of government. Put simply, the motives animating a particular public records request can be complex and are not as easily categorized as the Fourth Circuit indicates.

Assuming *arguendo* that Petitioner's requests are of a purely private import, the Fourth Circuit's holding is still problematic because it is not limited to requests under VFOIA made by non-citizens who seek information solely for private purposes. Because the Fourth Circuit did not limit its decision to the particular facts of the case, the rule it established applies to all cases going forward. If an out-of-state newspaper or broadcaster subsequently requests the exact same records as Petitioners in this case as part of a larger VFOIA request to investigate how child support enforcement occurs within the state, Virginia

could deny the request even though it advances the interests of other citizens.

Finally, the Fourth Circuit's reasoning is problematic because its inquiry into the motivation of the request exceeded that permitted by VFOIA. *See Associated Tax Service, Inc.*, 372 S.E.2d 625 (Va. 1988) (holding that Virginia officials cannot inquire into the purpose or motives of a particular VFOIA request). Thus, the Fourth Circuit weighed the value of the request in determining that the Petitioners sought information of a personal import, which is a factor Virginia officials cannot consider when responding to VFOIA requests.

Because VFOIA's discriminatory provision imposes direct restraints on the ability of non-citizens to access information, media outside of the commonwealth are impeded in their reporting on Virginia news that matters to the entire country. This unsupported law interferes with the press' historic, constitutionally protected role of government watchdog and undercuts the historic and fundamental role access to information plays in informing citizens in our democracy.

## CONCLUSION

For the foregoing reasons, *amici* respectfully requests that this Court reverse the decision below.

Respectfully submitted,

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## APPENDIX A

### Descriptions of *amici*:

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

Advance Publications, Inc., directly and through its subsidiaries, publishes 18 magazines with nationwide circulation, newspapers in over 20 cities, and weekly business journals in over 40 cities throughout the United States. It also owns many Internet sites and has interests in cable systems serving over 2.3 million subscribers. Advance Publications, Inc. publishes *The New Yorker*, which appears as a separate *amicus* within this brief.

A. H. Belo Corporation, along with its subsidiaries, publishes several daily newspapers, including *The Dallas Morning News*, Texas' leading newspaper and winner of nine Pulitzer Prizes since 1986. A. H. Belo also operates a diverse group of websites.

Allbritton Communications Company is the parent company of entities operating ABC-affiliated television stations in the following markets: Washington, D.C.; Harrisburg, Pa.; Birmingham, Ala.; Little Rock, Ark.; Tulsa, Okla.; and Lynchburg, Va. In Washington, it operates broadcast station WJLA-TV.



the 24-hour local news service, NewsChannel 8 and the news web sites, WJLA.com and TBD.com. An affiliated company operates the ABC affiliate in Charleston, S.C.

ALM Media, LLC publishes over thirty national and regional magazines and newspapers, including The American Lawyer, the New York Law Journal, Corporate Counsel, and the National Law Journal as well as the website Law.com. Many of ALM's publications have long histories reporting on legal issues and serving their local legal communities. ALM's The Recorder, for example, has been published in Northern California since 1877; the New York Law Journal was begun a few years later, in 1888. ALM's publications have won numerous awards for their coverage of critical national and local legal stories, including many stories that have been later picked up by other national media. ALM Media, LLC is privately owned, and no publicly held corporation owns 10 percent or more of its stock.

With some 500 members, the American Society of News Editors ("ASNE") is an organization that includes directing editors of daily newspapers throughout the Americas. ASNE changed its name in April 2009 to the American Society of News Editors and approved broadening its membership to editors of online news providers and academic leaders. Founded in 1922 as the American Society of Newspaper Editors, ASNE is active in a number of areas of interest to top editors with priorities on improving freedom of information, diversity, readership and the credibility of newspapers.

Ars Technica is a Condé Nast technology publication with offices in New York and millions of readers nationwide and internationally. Ars provides readers with in-depth technology news, hardware reviews, and policy analysis.

The Associated Press ("AP") is a global news agency organized as a mutual news cooperative under the New York Not-for-Profit Corporation Law. AP's members include approximately 1,500 daily newspapers and 25,000 broadcast news outlets throughout the United States. AP has its headquarters and main news operations in New York City and has staff in 321 locations worldwide. AP news reports in print and electronic formats of every kind, reaching a subscriber base that includes newspapers, broadcast stations, news networks and online information distributors in 116 countries.

Association of Alternative Newsmedia ("AAN") is a not-for-profit trade association for 130 alternative newspapers in North America, including weekly papers like The Village Voice and Washington City Paper. AAN newspapers and their web sites provide an editorial alternative to the mainstream press. AAN members have a total weekly circulation of seven million and a reach of over 25 million readers.

The Association of American Publishers, Inc. ("AAP") is the national trade association of the U.S. book publishing industry. AAP's members include most of the major commercial book publishers in the United States, as well as smaller and nonprofit publishers, university presses and scholarly societies. AAP members publish hardcover and paperback

books in every field, educational materials for the elementary, secondary, postsecondary and professional markets, scholarly journals, computer software and electronic products and services. The Association represents an industry whose very existence depends upon the free exercise of rights guaranteed by the First Amendment.

Atlantic Media, Inc. is a privately held integrated media company that publishes *The Atlantic*, *National Journal* and *Government Executive*. These award-winning titles address topics in national and international affairs, business, culture, technology and related areas, as well as cover political and public policy issues at federal, state and local levels. *The Atlantic* was founded in 1857 by Oliver Wendell Holmes, Ralph Waldo Emerson, Henry Wadsworth Longfellow and others.

Automattic is a privately held for-profit technology company based in San Francisco. Founded in 2005, Automattic develops and maintains numerous Internet products, including WordPress.com, an online hosting and publishing platform that powers nearly 40 million individual blogs in addition to several major news websites and some of the Web's most highly trafficked sites.

Bay Area News Group is operated by MediaNews Group, one of the largest newspaper companies in the United States with newspapers throughout California and the nation. The Bay Area News Group includes the San Jose Mercury News, Oakland Tribune, Contra Costa Times, Marin Independent Journal, West County Times, Valley Times, East County

Times, Tri-Valley Herald, The Daily Review, The Argus, Santa Cruz Sentinel, San Mateo County Times, Vallejo Times Herald and Vacaville Reporter. These newspapers rely on constitutional, statutory and common law protections for journalists' confidential sources and unpublished information in order to obtain and provide vital information to the public about government and corporate activities that affect their lives.

Belo Corp. owns or operates 20 television stations reaching 14% of U.S. television households, two regional cable news channels reaching more than three million households, four local cable news channels and more than 30 associated websites.

Bloomberg News is a 24-hour global news service with more than 1800 journalists in 146 bureaus around the world. Bloomberg News supplies real time business, financial and legal news to more than 300,000 desktop subscribers world-wide. As a wire service, Bloomberg provides news to more than 400 newspapers in 72 countries with a combined circulation of 76.2 million readers. Bloomberg also provides daily radio and television programming throughout the world through its 750 radio affiliates. Bloomberg News also operates a 24-hour global cable news channel, publishes two Monthly Magazines, Markets and Bloomberg BusinessWeek. Its internet website [www.bloomberg.com](http://www.bloomberg.com) receives 3.5 million individual user visits each month.

Cable News Network, Inc. ("CNN"), a division of Turner Broadcasting System, Inc., a Time Warner Company, is the most trusted source for news and in-

formation. Its reach extends to nine cable and satellite television networks; one private place-based network; two radio networks; wireless devices around the world; CNN Digital Network, the No. 1 network of news web sites in the United States; CNN Newsource, the world's most extensively syndicated news service; and strategic international partnerships within both television and the digital media.

The Center for Investigative Reporting is the country's oldest non-profit investigative news organization. Founded in 1977, the Center produces multimedia reporting that enables the public to demand accountability from government, corporations and others in power. The Center, and its California Watch and The Bay Citizen divisions, provide widely distributed in-depth investigative reporting focusing on local, state, national and international issues.

Courthouse News Service is a California-based legal news service for lawyers and the news media that focuses on new civil litigation, appellate rulings and controversies involving the law and the courts.

Founded in 2010 by Tucker Carlson and Neil Patel, The Daily Caller is a 24-hour news publication that provides its audience with original reporting, in-depth investigations, thought-provoking commentary and breaking news. In only its second full year of operations, The Daily Caller draws more than 8 million readers per month.

Daily Kos is an online, progressive political community and news organization with over 300,000 registered users. The users can post their own stories



and comments, which are a source of news and political analysis for millions of Americans.

Daily News, LP publishes the New York *Daily News*, a daily newspaper that serves primarily the New York City metropolitan area and is the sixth-largest paper in the country by circulation. The *Daily News*' website, NYDailyNews.com, receives approximately 22 million unique visitors each month.

The Digital Media Law Project ("DMLP") provides legal assistance, education, and resources for individuals and organizations involved in online media and independent journalism. The DMLP is jointly affiliated with Harvard University's Berkman Center for Internet & Society, a research center founded to explore cyberspace, share in its study, and help pioneer its development. The DMLP is an unincorporated association hosted at Harvard University, a non-profit educational institution.

Dow Jones & Company, Inc. is the publisher of *The Wall Street Journal*, a daily newspaper with a national circulation of over two million, WSJ.com, a news website with more than one million paid subscribers, *Barron's*, a weekly business and finance magazine and, through its Dow Jones Local Media Group, community newspapers throughout the United States. In addition, Dow Jones provides real-time financial news around the world through Dow Jones Newswires, as well as news and other business and financial information through Dow Jones Factiva and Dow Jones Financial Information Services.

The E.W. Scripps Company is a diverse, 131-year-old media enterprise with interests in television stations, newspapers, local news and information web sites, and licensing and syndication. The company's portfolio of locally focused media properties includes: 10 TV stations (six ABC affiliates, three NBC affiliates and one independent); daily and community newspapers in 13 markets; and the Washington, D.C.-based Scripps Media Center, home of the Scripps Howard News Service.

First Amendment Coalition is a nonprofit public interest organization dedicated to defending free speech, free press and open government rights in order to make government, at all levels, more accountable to the people. The Coalition's mission assumes that government transparency and an informed electorate are essential to a self-governing democracy. To that end, we resist excessive government secrecy (while recognizing the need to protect legitimate state secrets) and censorship of all kinds.

Gannett Co., Inc. is an international news and information company that publishes 82 daily newspapers in the United States, including USA TODAY, as well as hundreds of non-daily publications. In broadcasting, the company operates 23 television stations in the U.S. with a market reach of more than 21 million households. Each of Gannett's daily newspapers and TV stations operates Internet sites offering news and advertising that is customized for the market served and integrated with its publishing or broadcasting operations.

Grist is a nonprofit, online publication that serves 1.5 million readers each month with news, investigative reporting, and commentary about the environment and sustainability issues. Founded, in 1999, Grist is based in Seattle and has a staff of 25, with journalists in Washington, California, New York, and Washington, D.C.

Hearst Corporation is one of the nation's largest diversified media companies. Its major interests include ownership of 15 daily and 38 weekly newspapers, including the *Houston Chronicle*, *San Francisco Chronicle* and *Albany Times*; interests in an additional 43 daily and 74 non-daily newspapers owned by MediaNews Group, which include the *Denver Post* and *Salt Lake Tribune*; nearly 200 magazines around the world, including *Good Housekeeping*, *Cosmopolitan* and *O, The Oprah Magazine*; 29 television stations, which reach a combined 18 percent of U.S. viewers; ownership in leading cable networks, including Lifetime, A&E and ESPN; business publishing, including a minority joint venture interest in Fitch Ratings; and Internet businesses, television production, newspaper features distribution and real estate.

MapLight is a nonprofit, nonpartisan research organization that tracks money's influence on politics. MapLight provides journalists and the public with transparency tools connecting data on campaign contributions, legislators, and votes to reveal the impact of campaign contributions on public policy.

The Maryland-Delaware-District of Columbia Press Association, founded in 1908, is a nonprofit organization whose members include all of the daily

newspapers and nearly all of the non-dailies in Maryland, Delaware and the District of Columbia. The Association serves to bring together newspapers for the preservation and defense of the principles of the First Amendment and to promote the growth and development of the newspaper industry.

Matthew Lee is a journalist residing in New York who routinely files Freedom of Information requests at the local, state, national, and international/United Nations level for Inner City Press, which he founded. Delaware's denial of his FOIA request regarding a state settlement resulted in *Lee v. Minner*, 458 F.3d 194 (3d Cir. 2006).

MPA – The Association of Magazine Media (“MPA”) is a national trade association for multi-platform magazine companies. Representing approximately 225 domestic magazine media companies with more than 1,000 titles, MPA members provide broad coverage of domestic and international news in weekly and biweekly publications and publish weekly, biweekly and monthly publications covering consumer affairs, law, literature, religion, political affairs, science, sports, agriculture, industry and many other interests, avocations and pastimes of the American people. MPA has a long and distinguished record of activity in defense of intellectual property and the First Amendment.

MuckRock is an online open-government tool that helps members of the public and press file federal and state FOIA requests on issues of importance to those individuals. Created by journalists and entrepreneurs, MuckRock has filed almost 2,000 requests

for public records, over 475 of which have been successfully completed. Both Virginia and Arkansas have denied Freedom of Information requests filed through MuckRock because of their citizens-only provisions.

The National Press Club is the world's leading professional organization for journalists. Founded in 1908, the Club has 3,500 members representing most major news organizations. The Club defends a free press worldwide. Each year, the Club holds over 2,000 events including news conferences, luncheons, and panels, and more than 250,000 guests come through its doors.

National Press Photographers Association ("NPPA") is a nonprofit organization dedicated to the advancement of photojournalism in its creation, editing and distribution. NPPA's almost 8,000 members include television and still photographers, editors, students and representatives of businesses that serve the photojournalism industry. Since 1946, the NPPA has vigorously promoted freedom of the press in all its forms, especially as that freedom relates to photojournalism.

Newspaper Association of America ("NAA") is a nonprofit organization representing the interests of more than 2,000 newspapers in the United States and Canada. NAA members account for nearly 90% of the daily newspaper circulation in the United States and a wide range of non-daily newspapers. The Association focuses on the major issues that affect today's newspaper industry, including protecting the ability



of the media to provide the public with news and information on matters of public concern.

The Newspaper Guild – CWA is a labor organization representing more than 30,000 employees of newspapers, newsmagazines, news services and related media enterprises. Guild representation comprises, in the main, the advertising, business, circulation, editorial, maintenance and related departments of these media outlets. The Newspaper Guild is a sector of the Communications Workers of America. CWA is America's largest communications and media union, representing 700,000 men and women in both public and private sectors.

The New Yorker is an award-winning magazine, published weekly in print, digital, and online. Its writers, including Jane Mayer, David Grann, and Raffi Khatchadourian, regularly use information gained from federal and state freedom of information act laws to report on matters of state, national, and international importance.

The New York Times Company publishes The New York Times, The Boston Globe, and other newspapers. Through its newspapers and affiliated websites, it covers government and public events across the United States and around the world.

North Jersey Media Group Inc. ("NJMG") is an independent, family-owned printing and publishing company, parent of two daily newspapers serving the residents of northern New Jersey: The Record (Bergen County), the state's second-largest newspaper, and The Herald News (Passaic County). NJMG also

publishes more than 40 community newspapers serving towns across five counties, including some of the best weeklies in the state. Its magazine group produces high-quality glossy magazines including "(201) Best of Bergen," nearly a dozen community-focused titles and special-interest periodicals such as *The Parent Paper*. The company's Internet division operates many news and advertising web sites and online services associated with the print publications.

NPR, Inc. is an award winning producer and distributor of noncommercial news programming. A privately supported, not-for-profit membership organization, NPR serves a growing audience of more than 26 million listeners each week by providing news programming to 285 member stations which are independently operated, noncommercial public radio stations. In addition, NPR provides original online content and audio streaming of its news programming. NPR.org offers hourly newscasts, special features and ten years of archived audio and information. NPR has no parent company and does not issue stock.

Online News Association ("ONA") is the world's largest association of online journalists. ONA's mission is to inspire innovation and excellence among journalists to better serve the public. ONA's more than 2,000 members include news writers, producers, designers, editors, bloggers, technologists, photographers, academics, students, and others who produce news for the Internet or other digital delivery systems. ONA hosts the annual Online News Association conference and administers the Online Journalism Awards. ONA is dedicated to advancing the interests

of digital journalists and the public generally by encouraging editorial integrity and independence, journalistic excellence and freedom of expression and access.

POLITICO LLC is a nonpartisan, Washington-based political journalism organization that produces a newspaper and web site covering politics and public policy.

Radio Television Digital News Association ("RTDNA") is the world's largest and only professional organization devoted exclusively to electronic journalism. RTDNA is made up of news directors, news associates, educators and students in radio, television, cable and electronic media in more than 30 countries. RTDNA is committed to encouraging excellence in the electronic journalism industry and upholding First Amendment freedoms.

The Slate Group publishes *Slate*, a daily online magazine at [slate.com](http://slate.com), which provides analysis and commentary about politics, news, business, technology, and culture and receives approximately 8-10 million unique visitors per month.

The Society of Professional Journalists ("SPJ") is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry; works to inspire and educate the next generation of journalists; and

protects First Amendment guarantees of freedom of speech and press.

Stephens Media LLC is a nationwide newspaper publisher with operations from North Carolina to Hawaii. Its largest newspaper is the Las Vegas, Nev., Review-Journal.

The Student Press Law Center ("SPLC") is a non-profit, non-partisan organization which, since 1974, has been the nation's only legal assistance agency devoted exclusively to educating high school and college journalists about the rights and responsibilities embodied in the First Amendment to the Constitution of the United States. The SPLC provides free legal assistance, information and educational materials for student journalists on a variety of legal topics.

Techdirt is a group blog that serves well over a million readers every month. Techdirt provides analysis on government policy and technology, and has received widespread recognition for its coverage of proposed copyright legislation in 2011 and 2012.

Time Inc. is the largest magazine publisher in the United States. It publishes over 90 titles, including *Time*, *Fortune*, *Sports Illustrated*, *People*, *Entertainment Weekly*, *InStyle* and *Real Simple*. Time Inc. publications reach over 100 million adults and its web sites, which attract more visitors each month than any other publisher, serve close to two billion page views each month.

Tribune Company operates broadcasting, publishing and interactive businesses, engaging in the cov-

erage and dissemination of news and entertainment programming. On the broadcasting side, it owns 23 television stations, a radio station, a 24-hour regional cable news network and "Superstation" WGN America. On the publishing side, Tribune publishes eight daily newspapers — Chicago Tribune, Hartford Courant, Los Angeles Times, Orlando Sentinel (Central Florida), The (Baltimore) Sun, The Daily Press (Hampton Roads, Va.), The Morning Call (Allentown, Pa.) and South Florida Sun-Sentinel.

Tumblr is a privately held technology company, founded in 2007 by its CEO David Karp and based in New York. Tumblr provides products, a platform, and a network for original content creators (including many journalists). Tumblr.com hosts over 80 million blogs and reaches an audience of over 175 million people each month.

The Washington Post is a leading newspaper with nationwide daily circulation of over 623,000 and a Sunday circulation of over 845,000.

WNET is the parent company of THIRTEEN, WLIW21, Interactive Engagement Group and Creative News Group and the producer of approximately one-third of all primetime programming seen on PBS nationwide. Locally, WNET serves the entire New York City metropolitan area with unique on-air and online productions and innovative educational and cultural projects. Approximately five million viewers tune in to THIRTEEN and WLIW21 each month.



**APPENDIX B**

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